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Supreme Court of the United States

October Term, 1994

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, Individually and as Representatives of a Class of Persons Similarly Situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Section 4301(b)(3) of the Veterans' Reemployment Rights Act [38 U.S.C. § 4301, *et seq.*] provides in pertinent part that a military reservist "shall not be denied hiring, retention in employment, or any promotion or other *incident or advantage of employment* because of any obligation as a member of a Reserve component of the Armed Forces [emphasis supplied]."

The Questions Presented Are:

1. Whether an "incident or advantage of employment" must be *substantial* in order to be protected under Section 4301(b)(3).

2. Whether an employer who regularly and consistently deprives employee-reservists of their collectively bargained day off schedule, chosen by seniority, because of obligations as members of the Armed Forces but does not similarly deprive co-workers without military obligations, denies the reservists an "incident or advantage of employment" under Section 4301(b)(3).

List of Parties

Petitioners are a class of Correction Officers, Sergeants and Lieutenants employed by Respondent Department of Correctional Services who were, at all times relevant, also members of the National Guard of the State of New York or members of a Reserve component of the Armed Forces of the United States. This action was certified as a class action by Order of the United States District Court, Northern District of New York, dated and filed February 28, 1983. The caption contains a complete list of all Respondents.

The parties before this Court are identical to the parties in the proceedings below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, Individually and as Representatives of a Class of Persons Similarly Situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals

for the Second Circuit (Appendix A, infra, 1a-21a) entered in this case on March 14, 1994.

Opinions Below

A. The opinion of the Court of Appeals (Appendix A, infra, 1a-21a) is reported at 19 F.3d 83;

B. Order of the United States Court of Appeals for the Second Circuit dated and filed May 11, 1994 (Appendix B, infra, 22a-23a) denying respondents' petition for rehearing is unreported;

C. Order of the United States Court of Appeals for the Second Circuit dated and filed May 5, 1994 (Appendix C, infra, 24a-25a) denying petitioners' petition for rehearing is unreported;

D. Memorandum Decision and Order of the United States District Court, Northern District of New York dated December 31, 1991 (Appendix D, infra, 26a-50a) is unreported;

E. Memorandum Decision and Order of the United States District Court, Northern District of New York dated February 19, 1987 (Appendix E, infra, 51a-64a), is reported at 124 L.R.R.M. 2914.

Jurisdictional Grounds

The United States Court of Appeals entered Judgment on March 14, 1994 (Appendix A, infra, 1a-21a). The Court of Appeals denied respondents' petition for rehearing by Order

dated and entered May 11, 1994 (Appendix B, infra, 22a-23a). The Court of Appeals denied petitioners' petition for rehearing by Order dated and entered May 5, 1994 (Appendix C, infra, 24a-25a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provision Involved

Section 4301(b)(3)[1] of the Veterans' Reemployment Rights Act ("Act" or "VRRA") [38 U.S.C. §4301(b)(3)] provides: "Any person who seeks or holds a position [in the employ of the United States, a State, or a political subdivision thereof, or a private employer] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

Statement of the Case

1. Nature of The Suit

Petitioners brought suit in the year 1982 in the United States District Court for the Northern District of New York, alleging that respondents' policy, under its Directive 2212, of unilaterally changing petitioners' day off schedule, which they had selected on the basis of their seniority, whenever petitioners applied for leave to fulfill their mili-

[1]Pursuant to Public Law 102-568, Title V, §506(b), 106 Stat. 4340, October 29, 1992, 38 U.S.C. §§2021-2027 were renumbered as 38 U.S.C. §§4301-4307. When this action was commenced 4301(b)(3) was located at 38 U.S.C. §2021(b)(3).

tary reserve drill obligations violated §§2021(b)(3) [now 4301(b)(3)] and 2024(d) [now 4304(d)] of the Act, the Equal Protection Clause of the Fourteenth Amendment and New York State Military Law §242. Petitioners sought injunctive relief, lost wages and benefits and attorneys' fees pursuant to 42 U.S.C. §1988.

Jurisdiction was predicated upon 38 U.S.C. 2022 [now 38 U.S.C. 4302], 28 U.S.C. §1343, 42 U.S.C. §1983 and the doctrine of pendent jurisdiction.

2. The Seniority System

In response to employee discontent with respondents' method of assigning days off (days off are referred to in the Record and Joint Appendix to the Court of Appeals variously as "days off", "regularly scheduled days off", "RDOs" or "pass days"), the employees' bargaining agent, Council 82, negotiated the following provisions into each and every Collective Bargaining Agreement ("Agreement") between the parties beginning in 1970:

> 1. "Seniority shall be the basis by which employees shall select pass days"; and
>
> 2. "Regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime."

Under this seniority system implemented as a result of the Agreement and the custom and practice of the parties over the years, a job vacancy was filled by the most senior officer who bid on a posted job package. The job package

included not only the job title and work assignment, but fixed the RDO schedule, shift assignment and work location. The bid of the most senior qualified officer was accepted exclusively on the basis of seniority (JA 37, 193, 609, 611)[2]. Once a bid was awarded, the officer knew what his or her RDO schedule would be for as long as he or she held that bid job (JA 34-37, 133, 441, 590, 620-621; Appendix E, infra, 62a).

Before respondents issued Directive 2212, whenever employee-reservists'[3] military training days conflicted with scheduled work, they applied for leave of absence from work and leave was routinely granted. The applicant retained his or her regular day off schedule. If military training fell on an RDO, a reservist would need no leave of absence since he was not scheduled to work. After the effective date of the first Agreement in 1970 and before Directive 2212 was implemented "[a]n employee's pass days were not normally or customarily changed" (Appendix E, infra, 55a).

3. Directive 2212

On March 30, 1982 respondents put into effect Directive 2212 which states, in pertinent part, as follows:

> [R]egular days off . . . may be revised to avoid military drills during scheduled working hours.

---

[2]All references to "JA" refer to the Joint Appendix on appeal to the Second Circuit.

[3]The term "reservist" shall refer to both reservists and members of the National Guard.

Under this Directive, whenever a petitioner applied for leave of absence from work to attend ordered military drill on a scheduled work day, respondents would switch one of that employee-reservist's regularly scheduled days off to the day for which military leave had been requested, and then would require the petitioner to work on his or her regularly scheduled day off. For example, if an employee-reservist had a regular day off scheduled for Tuesday, was scheduled to work on Saturday and applied for leave to attend ordered military drill on Saturday, as soon as he applied, DOCS would advise petitioner that his pass day had been changed from Tuesday to Saturday and he was now required to work on Tuesday. In this example, if Saturday had been petitioner's scheduled day off, petitioner would have had no need to apply for leave. No claim has ever been made that any petitioner is entitled to have days off rescheduled to accommodate any reserve obligation.

Between March 30, 1982 and February 19, 1987, the date the Trial Court issued its decision finding this practice under Directive 2212 violative of the Act, Respondent DOCS changed petitioners' pass day schedules approximately 15,950 times to provide increased manpower to fulfill the duties mandated by law and, thereby, reduce overtime compensation (JA 881; Appendix E, *infra,* 56a). During the same period, no pass days of petitioners' coworkers without military obligations were regularly and consistently changed (Appendix E, infra, 56a).

4. Proceedings Below

a. *Violation of 4301(b)(3) found after trial.*

By Memorandum Decision and Order dated February 19, 1987, the Trial Court judge held that petitioners had been denied an incident or advantage of employment because of their military obligations in violation of §4301(b)(3) of the Act based, *inter alia*, upon the following findings:

(1) RDO schedules were selected by all employees, reservists and non-reservists alike, on the basis of seniority (Appendix E, *infra*, 58a); and

(2) RDOs were "regularly and consistently" changed pursuant to Directive 2212 whenever petitioners applied for military leave of absence, but no other employee's pass days were regularly or consistently changed (Appendix E, *infra*, 55a, 56a).

The Trial Court measured petitioners' damages by the "salary they would have been paid, had their pass days not been reassigned and they had been granted military leave" (Appendix D, *infra*, 28a). In a subsequent Memorandum Decision and Order dated December 31, 1991, the Court held that, inasmuch as petitioners were entitled to thirty days paid leave under New York State Military Law §242 (5) and that, pursuant to Article 15.1(g) of the Agreement, time spent on any paid leave was considered as time worked for purposes of computing overtime, petitioners were entitled to one day's overtime pay for each RDO involuntarily changed, to a maximum of 30 days per year (Appendix D, *infra*, 34a - 36a).

Employing these criteria, the parties stipulated, subject to appeal rights, to a total damage award for the entire class of $3,848,962.01 (JA 679B, 691). Judgment for that amount was entered on March 2, 1993.

b. *Finding of violation reversed on appeal.*

The Court of Appeals affirmed the Trial Court's findings that RDO schedules were selected on the basis of seniority and also concurred that respondents had violated the Agreement (Appendix A, *infra,* 8a, 11a).

With respect to the Act, however, the Appellate Court held there was no violation, based upon its conclusion that a chosen pass day schedule acquired by seniority pursuant to the terms of a Collective Bargaining Agreement cannot be considered an "incident or advantage of employment" under 4301(b)(3). The Court decided that §4301(b)(3) protects only a "substantial" incident or advantage of employment, citing two decisions rendered by this Court (Appendix A, *infra,* 14a, 16a). See *Monroe v. Standard Oil Co.,* 542 U.S. 549 (1981); *Accardi v. Pennsylvania Railroad,* 383 U.S. 225, 229 (1966).

Having concluded that only a substantial incident or advantage of employment warrants protection, the Court found that the right to one's seniority-based day off schedule did not rise to the level of "more dire" situations cited by the Court where violations had previously been found, such as termination, duty and schedule reassignments and a forty-hour work week (Appendix A, *infra,* 14a-16a). The Court held: "The changing of a reservist's pass days is not a substantial right such as, for instance, discharge, demotion, or failure to promote, all matters safeguarded by the Act"

and, thus, Directive 2212 had not deprived petitioners of an "incident or advantage of employment" in violation of the Act (Appendix A, *infra,* 16a).

In contradiction to the Trial Court's finding that only petitioners' pass days were "regularly or consistently" changed (Appendix E, *infra,* 55a - 56a), the Appellate Court found that Directive 2212 "did not penalize them [petitioners], or treat them differently than the other non-reservist Correction Officers, on account of their reserve status" (Appendix A, *infra,* 15a).

The Court remanded the case for recomputation of damages, based upon a violation of the Agreement but not the Act. Applications for rehearing by both parties were denied (See Appendices B and C, *infra,* 22a, 24a).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit misconstrued or misapplied the law as set forth by this Court in *Monroe* and *Accardi.*

a. *Monroe* established equality as the test.

In *Monroe v. Standard Oil Co.,* 452 U.S. 549 (1981), the Court succinctly framed the issue it was to decide, as follows:

> We granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work-scheduling accommodations for reservist-employees not made for other employees,

> whenever such accommodations reasonably can be accomplished.

Monroe, 452 U.S. at 551.

In *Monroe* the plaintiff sought to require his employer to reschedule his work so as to allow him the opportunity to make up overtime missed because of his military reserve obligation. The Court held that §4301(b)(3) demanded no such affirmative action; rather, reservists are entitled to "the *same treatment* afforded their co-workers without military obligations. [emphasis supplied]" *Monroe*, 452 U.S. at 560.

b. The Second Circuit added a substantiality test.

Citing both *Monroe* and *Accardi v. Pennsylvania Railroad Company*, 383 U.S. 225 (1966), the Second Circuit has now held that an employer need not afford employee-reservists the *same treatment* as co-workers without military obligations where the employment right withheld is not "substantial". It reversed the Trial Court and dismissed petitioners' 4301(b)(3) claim because, in its view, the "changing of a reservist's pass day is not a substantial right such as, for instance, discharge, demotion or failure to promote, all matters safeguarded by the Act." (Appendix A, infra, 16a).

c. This Court has never adopted a substantiality test.

The plain language of 4301(b)(3) does not support a substantiality analysis; had Congress intended to limit that provision to only incidents or advantages of employment deemed by some subjective criterion to be "substantial", it would not have used the adjective "any" in the statute.

Moreover, the remedial provision of the Act, §4302, mirrors this language, directing recovery of "any" loss of wages or benefits.

As the *Monroe* Court, itself, reported, the "consistent focus" of this legislation has always been that reservists be entitled to the "*same treatment* afforded their co-workers without military obligations. [emphasis supplied]" *Monroe* 452 U.S. at 560. The term "substantial" is used in *Monroe* on one occasion, not as a precondition to finding a violation, but rather to describe the gravity of the statutory obligation that provision imposes upon employers. *Monroe* 452 U.S. at 565. Thus, there is no support in *Monroe's* holding for a threshold finding of substantiality in order to make employer discrimination actionable.

Moreover, the language in *Accardi*, to which the Second Circuit presumably referred, rather than being limiting in nature, is expansive where it refers to veterans' "substantial rights" which cannot be limited by a Collective Bargaining Agreement. *See Accardi*, 383 U.S. at 229.

While *Monroe* serves as a shield protecting employers from having to undertake special accommodations for reservists, the Second Circuit has transformed it into a sword which allows employers to take affirmative action against reservists as long as such discrimination is not "substantial". In this, it misconstrues and misapplies the law as set forth by this Court.

II. Confusion and conflict exist as to what constitutes an "incident or advantage of employment".

a. Confusion is traceable, in part, to dicta in *Monroe*.

Despite providing the lower courts with a clear holding that §4301(b)(3) requires equal treatment but not special accommodations, this Court also stated the following:

> The legislative history thus indicates that §2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion . . . .

Monroe 452 U.S. at 559. Though not central to the *Monroe* holding, the Second Circuit has construed this "limited purpose" language as limiting the "incident or advantage of employment" protected to only those employment rights comparable in severity to discharge and demotion. *See Waltermyer v. Aluminum Company of America*, 804 F.2d 821, 826 (3rd Cir., 1986, Hunter, J., dissenting). *See generally Military Reservist-Employees' Rights under 38 U.S.C. §2021(b)(3)—What is an Incident or Advantage of Employment?*, 19 San Diego Law Review 877, 888 (1982) (Predicting confusion in the courts between the "equality" test and a "pseudo" test emanating from the *Monroe* "discharge and demotion" dicta).

However, an interpretation consistent with *Monroe's* equal treatment analysis is that 4301(b)(3) was enacted for the "limited purpose of *protecting* . . .", as opposed to *privileging*, reservists. *See e.g. Pignato v. American Trans*

Air, Inc., 14 F.3rd 342, 350 (7th Cir., 1994), *cert. denied*, ____ U.S. ____, 62 U.S.L.W. 3823 (June 13, 1994); *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024, 1027 (1st Cir., 1979), *cert. denied*, 446 U.S. 913 (1980); *See also Alber v. Norfolk and Western Railway Company*, 654 F.2d 1271 (8th Cir., 1981).

Compounding the confusion, the analogous statutory provisions of the Act which apply to veterans, relied upon heavily by the *Monroe* Court in reaching its decision, *see Monroe* 452 U.S. at 554-56, have always been accorded a "liberal", not "limited", construction by this Court. See *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) and *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977), *citing Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

b. The Second Circuit's decision below conflicts directly with the Third Circuit.

The Third Circuit, in the case of *Waltermyer v. Aluminum Company of America*, 804 F.2d 821 (3rd Cir., 1986), rejected this substantiality analysis. In *Waltermyer*, plaintiff reservist sought holiday pay he had not received because he had been on 2-week military drill and absent from work during the holiday week, thereby failing to satisfy the subject Collective Bargaining Agreement's requirement that he be present at work during the week of a holiday to receive holiday pay. The Trial Court found that plaintiff had not suffered any discrimination because there was no exception in the Agreement to the "presence at work" requirement specifically for military training.

The Third Circuit reversed. Guided by the principle that reservists are entitled to "the same treatment afforded their co-workers not having such military obligations", the Court examined the Collective Bargaining Agreement and found exceptions to the "presence at work" requirement for certain involuntary absences. *Waltermyer,* 804 F.2d at 823. Since plaintiff's absence was similarly involuntary, the Court held plaintiff entitled to holiday pay.

The dissent in *Waltermyer* would have affirmed the lower Court on the basis of a substantiality analysis virtually identical to the Second Circuit's:

> The Court [in *Monroe*] has ruled that §2021(b)(3) only applies to a limited category of employment benefits. ... Denial of holiday pay is not a "discrimination like discharge or demotion." It, therefore, does not come within §2021(b)(3)'s ambit.

Waltermyer, 804 F.2d at 826 (Hunter, J., dissenting). The majority rejected this substantiality argument which the Second Circuit now adopts, in rendering its decision in favor of *Monroe's* equal treatment analysis.

c. Conflict and confusion in the district courts.

Like the Second Circuit, some district courts have also expressly limited 4301(b)(3) to only "discriminations like discharge and demotion". *See Britt v. Georgia Power Company,* 677 F.Supp. 1169 (N.D. Ga., 1987); *Dembitsky v. Maruca,* No. 91-CV-0503E(F) (W.D.N.Y., July 28, 1993), 1993 W.L. 286077 at pp. 7-8, *aff'd,* 19 F.3d 8 (2d Cir., 1994). Yet, violations in other district courts involve rights much less dire than "discharge and demotion". For example,

several courts, employing an equal treatment analysis, have held that time spent in the Reserves must be included as time worked when computing retirement benefits. See *Arrington v. State of Florida*, 117 L.R.R.M. 3103, 1984 WL 3181 (N. D. Fla., 1984); *Letson v. Liberty Mutual Insurance Company*, 523 F.Supp. 1221 (N.D. Ga., 1981); *Schell v. Ohio State Highway Patrol*, 107 L.R.R.M. 3263, 1981 WL 2289 (S.D. Ohio, 1981). In *Hawes v. General Motors Corp.*, 102 L.R.R.M. 3041, 3042, 1979 WL 1956 (N.D. Ohio, 1979) the Court held, contrary to the Second Circuit below, that adverse action by an employer is protected under the Act even where it results in "no loss of position or status."

Inasmuch as *Monroe*, a five-four decision, was the first, and only, opportunity this Court has taken to date to examine this particular provision and because thirteen years have now elapsed since it was decided, certiorari should issue to address the conflict and confusion generated, at least in part, by the *Monroe* opinion itself.

III. The Second Circuit's holding is erroneous.

a. The Court wrongly ruled there was no discrimination in this case.

While the Court did not disturb the Trial Court's finding that *only* petitioners' RDOs were "regularly and consistently" changed, it nevertheless ruled that Directive 2212 "did not penalize them [petitioners], or treat them differently than the other non-reservist correction officers, on account of their reservist status" (Appendix A, infra, 15a). Had the Court properly applied *Monroe's* equal treatment analysis a finding of discrimination would have been unavoidable.

Unlike the reservist in *Monroe*, petitioners here have never sought to reschedule their days off to accommodate their military obligations. They seek only to prevent their employer from rescheduling their days off. They want to keep their chosen day off schedule when they apply for military leave. In short, petitioners seek the "same treatment afforded their co-workers without military obligations." *Monroe*, 452 U.S., at 560.

In applying the equal treatment analysis in 4301(b)(3) cases, courts must look to the subject Collective Bargaining Agreement to determine the specific rights conferred on all employees. *Waltermyer v. Aluminum Company of America*, 804 F.2d 821, 824-25 (3rd Cir., 1986). *See Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1948) ("We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran"). *See also McKinney v. Missouri-Kansas-Texas-Railroad Company*, 357 U.S. 265 (1958); *Alber v. Norfolk and Western Railway Company*, 654 F.2d 1271, 1276 (8th Cir., 1981).

Moreover, in an unbroken line of cases interpreting analogous provision of the VRRA, *see Monroe*, 452 U.S. at 554, this Court has unwaveringly supported the seniority rights of those who have answered the call of their country. *See Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977); *Accardi v. Pennsylvania Railroad*, 383 U.S. 225 (1966); *Oakley v. Louisville and National Railroad Co.*, 338 U.S. 278 (1949); *Fishgold v. Sullivan Drydock*, 328 U.S. 275 (1946).

Here, petitioners have alleged discriminatory treatment based upon their collective bargaining right to enjoy their own RDO schedule, selected by seniority, which was not limited to reservists, but was a seniority right enjoyed by *all employees*. Petitioners were the only employees denied that right and only when they sought to attend military drill.

b. The seniority right to one's chosen day off schedule is substantial.

The perquisite of seniority denied petitioners herein, the seniority right to their chosen pass day schedule, is no less "substantial", or "dire" than any number of other such employment rights held to be protected. *See Accardi v. Pennsylvania Railroad Company,* 383 U.S. 225 (1966) ($7,455.60 total award where time spent in military did not count toward seniority); *Waltermyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir., 1986) (Loss of two days holiday pay by a single reservist violates the Act); *Carney v. Cummins Engine Co., Inc.,* 602 F.2d 763, 766 (7th Cir., 1979) (Overtime opportunities missed because of military obligations are protected), *cert. denied,* 444 U.S. 1073 (1980); *West v. Safeway Stores, Inc.,* 609 F.2d 147, 150 (5th Cir., 1980) (Right to full work week, guaranteed to all employees, protected under the Act); *Carlson v. New Hampshire Department of Safety,* 609 F.2d 1024 (1st Cir. 1979) (Work schedule and duty reassignment violative of the Act), *cert. denied,* 446 U.S. 913 (1980); *Arrington v. State of Florida,* 117 L.R.R.M. 3103, 1984 WL 3181, (N.D. Fla., 1984) (Denial of ability to purchase retirement credits, available to co-employees, violates the Act); *Kidder v. Eastern Airlines, Inc.,* 469 F.Supp. 1060 (S.D. Fla., 1978) (Holiday pay is an incident or advantage of employment); *Hanning v. Kaiser Aluminum Corp.,* 95 L.R.R.M. 2964, 1977 WL

1710 (E.D. La., 1977) (Paid holidays are an incident or advantage of employment); *Lott v. Goodyear Aerospace Corporation*, 395 F.Supp. 866 (N.D. Ohio, 1975) (Opportunity to work overtime is an incident or advantage of employment).

The net effect of adopting a "substantiality" standard as the Second Circuit has done would to be to discard the above body of case law. Nevertheless, in light of the above cases and the specific language of the statute, the regular and consistent deprivation over a period of almost five years of over 15,000 pass days, resulting in a stipulated damage award in excess of $3.8 Million constitutes a substantial deprivation of rights, if such is the standard under 4301(b)(3).

IV. The Court of Appeals' decision has important national defense ramifications.

The "substantiality" test devised by the Second Circuit in this case can have an important and deleterious effect on the functioning of the Reserve and National Guard service in this country well beyond its effect on the 970 class members in this particular case. Presumably, according to the Second Circuit, discriminatory deprivation of a right that is not "like discharge and demotion" is permissible. Such a legal distinction will be lost on the rank and file reservists considering whether to join or stay in a Reserve unit. For example, all that is important to the class members in this case is that they will lose their days off if they stay in the Reserves and will not lose their days off if they stay out.

Congress has specifically affirmed and re-affirmed the importance of the National Guard and Reserve forces in the

United States. It has declared that such forces "are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice, to augment the active military forces in times of national emergency"; Congress has also stated that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge . . ." and has specifically sought the support of our nation's employers in this effort. See Recognition of National Guard and Reserve Forces Act dated May 2, 1986, P.L. 99-290 §1, 100 Stat. 413.

The Reserves and National Guard have become increasingly important in view of our recent conversion to an all-volunteer army and, even more recently, this country's military down sizing. For example, over 228,000 reservists were called up in support of Operations Desert Shield and Desert Storm during the Persian Gulf crisis. Bradshaw, *When Johnny Comes Marching Home Again: The Veterans' Reemployment Rights Act and Employer Obligations to Military Reservists,* 15 American Journal of Trial Advocacy 79, Cumberland School of Law, Samford University, Summer, 1991. These factors make it even more imperative that a strong ready reserve be maintained to supplement our regular forces. The only way to do this is to attract capable civilians in sufficient numbers. The viability of the whole reserve concept, which depends upon citizen volunteer participation, would be severely undermined if potential reservists knew they had to give up equal treatment vis-a-vis other employees at their civilian jobs if they chose to join.

Pursuant to the Second Circuit's decision, an employer could with impunity under the Act deprive an employee of a right of employment specifically because the employee is a

member of the Reserves as long as it is not "like discharge and demotion". It is easy to see that such a ruling will not be conducive to "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve".

Conclusion

For the foregoing reasons, a writ of certiorari should be granted in this case.

Dated: July 29, 1994
Albany, New York

Respectfully submitted,

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APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit, Decided March 14, 1994.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 241, 528—August Term 1993

(Argued September 27, 1993 Decided March 14, 1994)

Docket Nos. 93-7273, 93-7333

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Before:

CARDAMONE, MCLAUGHLIN and LAY,*

Circuit Judges.

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* Honorable Donald P. Lay, Senior Circuit Court Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

New York State Department of Correctional Services and Thomas Coughlin III appeal a judgment dated March 2, 1993 of the United States District Court for the Northern District of New York (Cholakis, J.) compensating plaintiffs for lost wages and awarding prejudgment interest and attorney's fees because the application of a departmental directive denied plaintiffs an incident or advantage of their employment in violation of 38 U.S.C. § 4301(b)(3) (1988). Plaintiffs cross-appeal on the damages issue.

Affirmed, in part, reversed, in part, and remanded.

Cross-appeal affirmed.

JOHN MCCONNELL, Assistant Attorney General, Albany, New York (Robert Abrams, Attorney General, Peter H. Schiff, Deputy Solicitor General, Albany, New York, of counsel), *for Defendants-Appellants-Cross-Appellees.*

THOMAS J. FORREST, Albany, New York (James J. Seaman, Rowley, Forrest, O'Donnell & Hite, P.C., Albany, New York, of counsel), *for Plaintiffs-Appellees-Cross-Appellants.*

CARDAMONE, *Circuit Judge*:

On September 15, 1982 Lee S. Rumsey, individually and as a member of a class of nearly 1000 New York State correction officers, sergeants and lieutenants employed by the Department of Correctional Services, all of whom are also members of the New York National Guard or a

reservist branch of the U.S. Armed Forces, commenced a class action in the United States District Court for the Northern District of New York (Cholakis, J.). The action alleged that the defendants, New York State Department of Correctional Services (Department) and Thomas Coughlin III, Commissioner of the Department, violated the Veterans' Reemployment Rights Act, (Veterans' Act), 38 U.S.C. §§ 2021(b)(3) and 2024(d) (1988) (renumbered 38 U.S.C. §§ 4301(b)(3) and 4304(d)[1]) and New York Military Law § 242(4) (McKinney 1990). In addition, the complaint asserted that the class members were denied the equal protection of the law, violating 42 U.S.C. § 1983 (1988).

The action was prompted by defendants' promulgation of Directive No. 2212, which required correction officers to change their pass days (days off) to correspond with their military reservist obligations. Plaintiffs sought injunctive relief, compensation claimed to have been lost as a result of the rescheduled pass days, and attorney's fees pursuant to 42 U.S.C. § 1988 (Supp. III 1991). Just as the poet who wrote: "Sewing at once, with a double thread, A Shroud as well as a Shirt," Thomas Hood, *The Song of the Shirt*, in 1 *The Poetical Works of Thomas Hood* 193, 194 (Little, Brown & Co. 1864), the trial judge thought the Department's promulgation of Directive No. 2212 had twin consequences, that is to say, it at once violated both a collective bargaining agreement the Department had with its National Guard/reservist employees *and* § 4301(b)(3) of the Veterans' Act. We cannot agree that it had such double consequences. Before explaining our reasons for differing from the trial court, we set forth the

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[1] Pursuant to Public Law 102-568, 106 Stat. 4340, 4341, 38 U.S.C. §§ 2021-2027 were renumbered as 38 U.S.C. §§ 4301-4307 on October 29, 1992.

somewhat complex circumstances that prompted this litigation.

BACKGROUND

Plaintiffs are all members of either the Security Services Unit, representing correction officers and sergeants, or the Security Supervisors Unit, representing correction lieutenants. The bargaining representative for both of these units is the New York State Inspection Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO (Council 82). Collective bargaining agreements covering these state employees have been in force since 1970, involving several labor agreements over the time span alleged in the complaint. Because all pertinent provisions in these agreements are the same and apply to both employee bargaining units, references in what follows will be to the provisions of the 1982-85 Security Services Unit collective bargaining agreement, which went into effect on April 1, 1982.

Pursuant to that agreement, job vacancies in state correctional facilities are posted as they occur, and interested employees may bid for them. The postings indicate the work location, that is, at what specific correctional institution there is an opening, and include the hours and days the shift is to be worked, and what days are off. Assignments to these vacancies are awarded on a seniority basis. The labor agreement states that "[r]egularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime." The Department contends that this provision has been interpreted to mean that overtime must be paid to an employee whose pass days are changed only after the pass days have been posted.

Many hundreds of correction officers are reserve members of the Armed Forces. Counsel in this case have stipulated the plaintiff class to consist of approximately 970 members. When a temporary vacancy is created because an officer is performing military duties, the position must be filled by another officer to ensure that the correctional facility is adequately staffed. The substituting officer is entitled to overtime. During a 1981 state investigation following complaints about military leave procedures, many abuses were discovered. Those included, for example, employees failing to report to the military after being granted leave by the Department, departing early from military duty, or submitting fictitious military leave orders. About 47 percent of the 245 audited military leave cases were found to be without supporting documentation. Those abuses allegedly cost the State of New York millions of dollars.

In response to this perceived drain on the public fisc, the Department promulgated the subject Directive No. 2212 setting forth procedures for requesting, approving and verifying the use of paid military leave by employees. By applying Directive No. 2212 the Department was able to change employees' days off to coincide with their military duty days, thereby reducing overtime necessary to fill vacancies that would have occurred had the officer been performing military duty on a regularly assigned work day. The result is that employee-reservists before passage of the Directive worked three days and were paid for five—three days work, two days off without pay, followed by two days of military duty for which they were paid. After the Directive, the same individuals had to work five days to get paid for five days, the two days of military duty being on non-pay pass days.

In its March 2, 1993 judgment following a non-jury trial, the district court first found plaintiffs' rights to pass days were protected by their collective bargaining agreement, and since Directive No. 2212 denied plaintiffs an incident or advantage of their employment because of their military reservist obligations, the Department's action, the trial court concluded, also violated 38 U.S.C. § 4301(b)(3). It therefore made the following award to plaintiffs: compensation for lost wages, measured by the salary the employees would have been paid had their pass days not been reassigned, limited to the first 30 days compensable under N.Y. Mil. Law § 242(5); damages to employees who had taken personal leave or vacation leave instead of applying for military leave; prejudgment interest and attorney's fees.

This calculation of plaintiffs' damages was set forth in the district court's February 19, 1987 decision and order, and explained further in its December 31, 1991 decision and order. In the later decision, the trial judge indicated that compensation for lost wages was to be measured at the overtime rate:

> reflecting both (1) the pay plaintiffs would have received had the military days occurred on non-pass days (which would have happened absent defendants' rescheduling), and (2) that, since plaintiffs worked five full days and had two military days that, absent rescheduling, would have been compensable, the military days should count towards overtime for those weeks, in accordance with provisions of the collective bargaining agreement.

The Department appeals the ruling that held assigned pass days were an incident or advantage of employment, and that further held the application of Directive No. 2212

violated both the collective bargaining agreement *and* § 4301(b)(3) of the Veterans' Act. The Department also appeals the damage award maintaining that (1) the Eleventh Amendment bars the award of retroactive monetary damages against the state; (2) if retroactive monetary damages are appropriate, they were calculated incorrectly; and (3) attorney's fees are not available through application of 42 U.S.C. § 1988. The plaintiffs have cross-appealed because overtime damages were limited to the first 30 days compensable under N.Y. Mil. Law § 242(5). The award of prejudgment interest is not challenged on appeal. We pass to a discussion of these issues.

DISCUSSION

I *Plaintiffs' Rights*

A. *Under The Collective Bargaining Agreement*

We must ascertain first whether Directive No. 2212, which made employee-reservists perform their military duties on their regular days off, violated the collective bargaining agreement. The district court found plaintiffs' right to assigned pass days, secured through an exercise of seniority, was a right protected by the labor agreement. We review this finding under the clearly erroneous standard, *see* Fed. R. Civ. P. 52(a), and that finding need only be plausible when examining the record as a whole. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Under Article 24 of the labor agreement the Department reserved to itself the right to make any job or shift assignment necessary to maintain the services of the Department. It is required to post for 30 days all permanent vacancies before making a permanent assignment. As

related, employees select their work assignments by bidding on work packages that contain the particular shift to be worked, its location and the pass day or days off schedule. Because pass days are advertised to employees as a combined package along with shift and work location, the successful bidder is awarded the entire work package.

Paragraph 24.2 further provides "[s]eniority shall be the basis by which employees shall select pass days." Seniority is defined in ¶ 24.1 of the labor agreement as "the length of an employee's uninterrupted service in title in a department or agency including sick leave, military leaves not to exceed four years and other leaves of absence which do not exceed one year and Worker's Compensation leave." The district court ruled that once an employee is assigned a work package the pass days are set and regularly scheduled for as long as the employee remains a member of that particular work-shift.

The trial court also found that ¶ 15.3(e)—which provides that "[r]egularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime"—protects employees from having their assigned pass days changed. The Department contends this provision merely restrains it as employer from making *ad hoc* changes to an individual employee's pass days, but that it does not bar the Department from limiting overtime by making general policy decisions. The Department's argument has a plausible ring to it, but the plain language of ¶ 15.3(e) is to the contrary. It prohibits the Department from changing pass days cast in the guise of a departmental policy, which in practice allow the Department to avoid the payment of overtime, whether the pass day change occurred once and only affected one employee or whether it occurred, as here, thousands of times and affected many employees.

Nonetheless, the Department maintains, a November 1976 settlement agreement reached in a suit by campus police officers at the State University of New York (SUNY) at Plattsburg regarding the rescheduling of days off changed the application of ¶ 15.3(e) for correction officers. The State of New York Office of Employee Relations and Council 82 entered into the so-called Boas settlement agreement, which interpreted ¶ 15.3(e) (then Article 16.3(e) of a predecessor labor agreement) as follows: "[e]xcept in the case of an emergency or due to unforeseen circumstances, any employee whose posted regularly scheduled day off is changed shall be paid at the overtime rate that day." The SUNY campus police officers are covered by the same collective bargaining agreement as the correction officers, but they are on a work schedule where management posts job assignments 28 days before the work schedule goes into effect. Employees have to refer to the posted schedule to determine what shifts and rest days management has assigned.

The Department insists the Boas settlement applies to the correction officers and, after an employee's pass days are posted, they may be changed provided the employee is paid overtime for the changed pass day. The Boas settlement attempted to reconcile the charge that the Department was making changes in days off to avoid paying overtime. Nevertheless, no evidence at trial showed that the pass days of the correction officers before us were posted within the meaning of the Boas settlement. Nor is there any language in the settlement making it applicable beyond the SUNY system. Joseph Bress who signed the settlement on behalf of the State of New York testified at trial that he and Carl Gray, former Executive Director for Council 82, agreed that it applied to the Council 82 contract generally. He further testified that the Office of

Employee Relations had applied the settlement agreement subsequent to its signing and that it was still being applied as a matter of practice between the parties. Based on his testimony, the Department urges that the Boas settlement be enforced against the present plaintiffs. Mr. Gray, who signed the Boas settlement on behalf of Council 82, averred that when it was signed it was intended to apply solely to SUNY security officers. Richard Bischert, District Director for Council 82, also stated the application of the Boas settlement was limited to university police.

Although the district court did not address the Boas settlement explicitly, it took considerable testimony on this subject and obviously considered whether the settlement agreement was applicable when it discussed the Department's negotiation strategy regarding the attempted elimination of ¶ 15.3(e) from the labor agreement. In addition, the record reveals that the trial court was fully aware of the details and complexities of the Boas settlement. Hence, in failing to make a finding that the Boas settlement applied to the correction officers, it impliedly found it did not. Refusing to give effect to the Boas settlement was a determination the district court made based on the credibility of witnesses who gave conflicting testimony and may not be said to be clearly erroneous in light of the record evidence, even though a contrary view would not be unreasonable. *See Anderson*, 470 U.S. at 574.

On March 30, 1982 after a year-long investigation into the earlier recited military leave abuses, the Department issued Directive No. 2212 setting forth procedures for requesting, approving and verifying the use of paid military leave by Department employees. Employees were directed to provide their watch commander with a copy of each quarterly military training schedule. The directive advised employees that "[t]he Deployment Lieutenant/

Attendance Control Office will review the quarterly training schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, regular days off and shift assignments may be revised to avoid military drills during scheduled working hours." Employees were also informed that "[t]he entire thirty (30) days paid military leave allowance must be used before military leave without pay, or the use of accrued vacation, personal leave or holiday leaves may be granted."

According to the Department, Directive No. 2212 was designed to mitigate military leave abuses, reduce global overtime and other costs caused by absenteeism through this abuse, minimize use of vacation and personal leave for military duty and maintain the fullest possible complement of employees at correctional facilities throughout the state. Prior to its adoption, the Department did not change the pass days of any of the affected employees to coincide with their military duty days. Instead, if military duty fell on an employee's scheduled work day he or she was granted military leave and still retained his or her assigned pass days. By using the authorization contained in Directive No. 2212, the Department was able to reschedule 15,950 pass days.

We agree with the district court's findings that the Department had twin purposes in rescheduling pass days: to provide the increased manpower needed to fulfill the duties mandated by law and to reduce overtime compensation. We also agree with the trial court's conclusion that the Department violated article 24 of the collective bargaining agreement when it rescheduled appellees' pass days. It is evident that application of the Directive altered the seniority provisions of ¶¶ 24.1 and 24.2 of the labor agreement since employees could not select pass days

independently of the seniority-based selection of the entire job package. Further, the Directive authorized the Department to change pass days to avoid paying overtime contrary to the provisions of ¶ 15.3(e) of the labor agreement. Because the language of ¶ 15.3(e) does not require that avoiding the payment of overtime be the *sole* reason for changing pass days, the finding that the Directive violated that provision of the labor contract is not clearly erroneous.

B. *Under The Veterans' Act*

We turn now to analysis of the Veterans' Act. The key provision of that Act states:

> Any person who seeks or holds a position [in the employ of a State] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. § 4301(b)(3). The question to be decided is whether the Department's alteration of pass days through the application of Directive No. 2212 deprived plaintiffs of an "incident or advantage of employment" thus violating § 4031(b)(3) of the Veterans' Act. It does not automatically follow, as the district court held, that breach of the collective bargaining agreement is a violation of the Veterans' Act.

In *Monroe v. Standard Oil Co.*, 452 U.S. 549, 552 n.2 (1981), the seminal case applying the Veterans' Act to reservists, the Supreme Court concluded § 4301(b)(3) provides protection to both Ready Reservists and National Guardsmen. *See also United States ex rel. Reilly v. New England Teamsters & Trucking Indus. Pension Fund*, 737

F.2d 1274, 1278-79 (2d Cir. 1984). Congress' aim in this legislation is plain. It is "to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership." S. Rep. No. 1477, 90th Cong., 2d Sess. 1-2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3421, 3421. The House Report described the bill as providing:

> "job protection for employees with obligations as members of a reserve component. . . .
>
> Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [*sic*] solely [*sic*] because of such Reserve affiliation.
>
> *It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligation.*"

H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968) (*quoted in Monroe*, 452 U.S. at 558 (emphasis added)). In the House Committee hearing Rear Admiral Burton H. Shupper, U.S.N., testified that one aspect of the bill protects employees against being " 'denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces.' " *Hearings on H.R. 11509 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 89th Cong., 1st Sess. 5315 (1966) (*quoted in Monroe*, 452 U.S. at 559).

Section 4304(d) of the Veterans' Act grants an employee the right upon request to be granted leave by

the employer "for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States." Significantly, for our purposes, it was never Congress' purpose in protecting the rights of employee-reservists to afford them special privileges or benefits not available to their co-workers. *See Monroe*, 452 U.S. at 561.

In order for Directive No. 2212 to violate the Veterans' Act, the awarding of pass days must be considered an "incident or advantage of employment" under § 4301(b)(3), and must be found to be within Congress' focus of "protect[ing] reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations." *Id.* at 560. An employer may not by the use of slippery words or a contrived definition deprive its employee-reservists of substantial rights granted them under the Act. *See Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 229 (1966).

Here the Department characterizes the change of pass days or regular days off as being less than a substantial right and therefore not covered by the Act. In support of that proposition, the Department points out that the Directive did not reduce plaintiffs' compensation—employee-reservists continued to earn the same amount of pay for the same amount of work as non-reservists—nor did it affect promotion rights or pension rights or the opportunity to earn overtime pay.

Cases holding that an employer has violated the Veterans' Act have involved more dire actions vis-à-vis the employee-reservist's status as an employee: for example, loss of employment, *see Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1073 (5th Cir. 1979), or workplace assignment and duties assigned, *see Carlson v.*

New Hampshire Department of Safety, 609 F.2d 1024, 1027 (1st Cir. 1979) (employer may not permanently reassign an employee to a new post with different duties and work schedule on account of employee's reserve obligation), *cert. denied*, 446 U.S. 913 (1980).

Perhaps one of the most important incidents or advantages of employment is the salary assured by a 40-hour work week guaranteed under a collective bargaining agreement. *See West v. Safeway Stores, Inc.*, 609 F.2d 147, 150 (5th Cir. 1980) (employer required to schedule employee's 40-hour work week around the employee's military training obligation). In the case at hand, plaintiffs were paid for and worked a full 40-hour week. Concededly, plaintiffs lost the privilege of working 24 hours and being paid as though they had worked 40 hours, a benefit they previously enjoyed before the advent of Directive No. 2212. But the new rule did not penalize them, or treat them differently than the other non-reservist correction officers, on account of their reservist status.

Decisions under the Veterans' Act differ with respect to a contractual obligation to afford opportunities to earn overtime. *Compare Breeding v. TRW, Inc., Ross Gear Div.*, 477 F. Supp. 1177, 1184 (M.D. Tenn. 1979) (where collective bargaining agreement provides opportunities to work overtime such must be offered to employees equally; an employee unavailable to work overtime on account of military training was not entitled under the Act to an alternative opportunity), *aff'd*, 665 F.2d 1043 (6th Cir. 1981) *with Lott v. Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869-70 (N.D. Ohio 1975) (similar circumstance held to deny the employee an incident of employment) *and Carney v. Cummins Engine Co.*, 602 F.2d 763, 766-67 (7th Cir. 1979) (employer must grant employee

overtime opportunities missed by reason of National Guard service), *cert. denied*, 444 U.S. 1073 (1980).

In the present litigation the reservists were not seeking the opportunity to earn overtime. It was their co-workers substituting for the reservists who earned such pay. As the district court found in its February 19, 1987 decision, "the overtime of the particular National Guardsman/Reservist whose pass days are being changed may not be affected." Section 4301(b)(3) has as its aim the limited purpose of safeguarding the employee-reservist from discrimination such as a failure to promote or a discharge prompted solely by the employee's reserve status. *See Monroe*, 459 U.S. at 559. True, the Department's action touched the general subject of overtime, but it did not diminish a reservists' right to earn overtime pay when he or she worked overtime. The changing of a reservist's pass days is not a substantial right such as, for instance, discharge, demotion, or failure to promote, all matters safeguarded by the Act.

In sum, the district court wrongly ruled that the violation of the collective bargaining agreement by itself constituted a violation of § 4301(b)(3). Directive No. 2212 did not deprive plaintiffs of an "incident or advantage of employment" in violation of the Veterans' Act. Accordingly, we need not reach the issue of whether the Eleventh Amendment bars the award of retroactive damages against the state.

II Damages

Discussion now proceeds to the issue of damages. The contractual breach of plaintiffs' collective bargaining agreement caused by the Directive gives rise to damages. The labor agreement provides at ¶ 15.1(g) that "[t]ime

during which an employee is excused from work because of vacation, holidays, personal leave, sick leave at full pay, compensatory time off or other leave at full pay shall be considered as time worked for the purpose of computing overtime." In its February 19, 1987 decision the district court found plaintiffs "lost the value of their pass days, which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." The parties were directed to submit information regarding the number of pass days reassigned for each member of plaintiffs' class since March 30, 1982 and the wages each member would have received had pass days not been reassigned to coincide with military leave days.

Because we hold there was no violation of the Veterans' Act, we affirm the calculation of damages for plaintiffs set forth in the trial court's December 31, 1991 decision only as related to a breach of the collective bargaining agreement. We recognize that pass days rescheduled as a result of Directive No. 2212 will be compensated at the overtime rate and confined to the application of ¶ 15.1(g). Because of the dynamics of ¶ 15.1(g), the district court must review the damage award on an individual basis to ensure it is not of a speculative nature. Damages should not be awarded under the Veterans' Act because it was not transgressed by the Department's promulgation of Directive No. 2212.

On plaintiffs' cross-appeal, they contend they should recover straight time for each day in excess of 30 that an officer's pass days were changed to accommodate military reserve duty. This argument is unavoiding because compensation is provided pursuant to N.Y. Mil. Law § 242(5) for only 30 days. Damages should apply up to the 30-day maximum per year authorized by § 242(5) because after

these 30 days are used up, the military leave days will no longer be counted under ¶ 15.1(g) as they should not be considered "other leave at full pay" for the purpose of calculating overtime. The district court ruled properly on this aspect of the damages issue.

It nonetheless erred when it granted a day's pay to each plaintiff who used accrued personal leave instead of notifying the Department of their military duties. Even though the provisions of Directive No. 2212 authorizing pass days to be changed contravene the collective bargaining agreement, the procedures designed to notify the employer of military duty, if pay was expected under New York Military Law, were valid. By taking personal leave for these days, plaintiffs said in effect that they did not desire to have the benefits of § 242(5). The correction officers should have complied with the Directive and then made a claim. They are not entitled to pay for those days on which they claimed personal leave, sick time or the like. Thus, the damages issue must be remanded in order for the district court to recalculate the award to eliminate this overpayment to plaintiffs.

III Attorney's Fees pursuant to 42 U.S.C. § 1988

The trial court further ruled in its December 31, 1991 decision that although it did not reach the equal protection claim under § 1983, plaintiffs were entitled to attorney's fees because their equal protection claim was substantial, and even though the Veterans' Act does not provide for attorney's fees, neither the statute nor its legislative history precluded awarding attorney's fees under 42 U.S.C. § 1988. This ruling was in error.

Awarding attorney's fees under § 1988 may only be based on plaintiffs' equal protection claim. Here no such

claim exists. Plaintiffs do not contend they have a fundamental right to perform military reservist duties on specific days, but instead insist the Department discriminates against them because they are members of a class of military reservists. We find no case law supporting the assertion that a class of military reservists is either a suspect class entitled to strict scrutiny or even a quasi-suspect class entitled to intermediate scrutiny.

We therefore proceed to examine their claim only to be sure that Directive No. 2212 is rationally related to furthering a legitimate state interest. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam). Two of the Directive's objectives, as we have noted, were the maintenance of adequately staffed correctional facilities and a reduction in abuses of the military leave policy resulting in inordinate overtime. Because the means to accomplish these goals—the changing of correction officers' pass days to coincide with their military duty days—is not a purely arbitrary or irrational means of accomplishing this goal, *see Vance v. Bradley*, 440 U.S. 93, 97 (1979), the Directive is rationally related to a legitimate state interest. As a consequence, plaintiffs are not entitled to attorney's fees under § 1988.

Even were we to conclude that plaintiffs stated a substantial equal protection claim, Congress planned to supplant a § 1983 claim with the enforcement provisions of the Veterans' Act. The Supreme Court in *Smith v. Robinson*, 468 U.S. 992, 1012 (1984), instructs that the proper inquiry is whether:

> Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, . . . § 1983 has stood as an independent safeguard against deprivations of federal constitu-

> tional and statutory rights. . . . Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy.

Id.

A § 1983 cause of action is unavailable "when Congress has foreclosed enforcement of the statute in the statute itself, or when a statutory remedial scheme is so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754 (2d Cir. 1987); *see also Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). If a § 1983 cause of action is unavailable, attorney's fees may not be awarded under § 1988. *See* 42 U.S.C. § 1988(b).

The enforcement scheme of the Veterans' Act is particularly detailed and comprehensive. It provides a plaintiff with a private right of action through injunctive relief, compensatory damages in the form of lost wages and/or benefits, and the assistance of the United States attorney. *See* 38 U.S.C. § 4302. Further, no fees or court costs may be assessed against a person seeking benefits under the Act. *See id.* These provisions evidence "a statutory remedial scheme [which] is so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies." *Mrs. W.*, 832 F.2d at 754. Therefore, attorney's fees could not properly have been awarded in this case even were a viable equal protection claim alleged.

CONCLUSION

Accordingly, the district court's judgment dated March 2, 1993 is affirmed, in part, reversed, in part, and remanded for recalculation of damages consistent with this opinion. The issue raised on plaintiffs' cross-appeal with respect to the district court's limitation of overtime compensation is affirmed.

APPENDIX B—Order of the United States Court of Appeals for the Second Circuit Denying Respondents' Petition for Rehearing, Dated May 11, 1994.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11 day of May on thousand nine hundred and ninety-four.

Present: Hon. Richard J. Cardamone
Hon. Joseph M. McLaughlin
Hon. Donald P. Lay*

CIRCUIT JUDGES,

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiff-Appellees-Cross Appellants,

-v-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 93-7273(L)
93-7333

A petition for rehearing having been filed herein by Appellants-Cross-Appellees NEW YORK STATES DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*

Under consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: s/Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

Filed May 11 1994
United States Court of Appeals
Second Circuit
George Lange III, Clerk

APPENDIX C—Order of United States Court of Appeals for the Second Circuit Denying Petitioners' Petition for Rehearing, Dated May 5, 1994.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5 day of May one thousand nine hundred and ninety-four.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-v-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 93-7273(L)
93-7333

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by plaintiffs-appellees, cross-appellants Lee S. Rumsey, *et al.*,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: s/Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

Filed May 5 1994
United States Court of Appeals
Second Circuit
George Lange III, Clerk

APPENDIX D—Memorandum Decision and Order of the United States District Court, Northern District of New York, Entered January 2, 1992.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN III, as Commissioner of the New York State Department of Correctional Services,

Defendants.

82-CV-979
Filed: 12/31/91
Entered: 1/2/92

Appearances:

Rowley, Forrest & O'Donnell, P.C., Attorneys for Plaintiffs, 90 State Street, Albany, New York 12207

Robert Abrams, Attorney General State of New York, Attorney for Defendants, Department of Law, The Capitol, Albany, New York 12224

CON. G. CHOLAKIS, D.J.

Of Counsel:

Thomas J. Forrest, Esq.

Alan S. Kaufman, Esq.
Assistant Attorney General

MEMORANDUM DECISION AND ORDER

Plaintiff class consists of approximately 520 Correction Officers, Sergeants or Lieutenants employed by the Department of Correctional Services of the State of New York ("Corrections") since March 30, 1982, and who are or were also members of the National Guard of the State of New York or another reserve component of the Armed Forces of the United States of America since the same date. As members of the Guard or other reserves, plaintiffs were required to report periodically for training throughout each year. Such reporting requirements often conflicted with already scheduled work days for Corrections.

This lawsuit, commenced in 1982, consisted of a challenge to defendant's Directive No. 2212 pursuant to which defendants rescheduled employees' days off ("pass days")

so that the days plaintiffs had to report for military duty always fell on pass days. This court, by Memorandum Decision and Order dated February 19, 1987, held that (1) the plaintiffs' rights to the pass days, which days were part of work packages bid upon by plaintiffs and awarded on the basis of seniority, were protected by a collective bargaining agreement; (2) the implementation of Directive No. 2212 denied plaintiffs an incident or advantage of their employment because of their military obligations, which thereby violated 38 U.S.C. § 2021(b)(3); and (3) plaintiffs were entitled to be compensated for the value of their pass days, "which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." *Rumsey v. New York State Dept. of Correctional Services,* No. 82-CV-979, slip op. at 14 (N.D.N.Y. Feb. 19, 1987).

The parties were directed to determine, for each plaintiff, (1) the number of pass days reassigned pursuant to Directive No. 2212; and (2) the wages that each plaintiff would have received for the days he or she was on military duty had he or she been granted military leave for the maximum period allowed by N.Y. MIL. LAW § 242. *Id.* By March 11, 1988, the parties reached preliminary agreement concerning the computation of straight time wages and the number of pass days changed for individual members of the class. *See* Forrest Aff. par. 4. A tabulation sheet was developed for each class member, listing the year; facility; number of "compensable RDO's,"[1] which is the number of rescheduled days, under the maximum of thirty days, payment for which is allowed under the New York Military Law; number of "non-compensable RDO's," which is the number of re-

[1]"RDO" is nowhere defined, but the Court assumes that it stands for "Rescheduled Day off" or "Reassigned Day Off."

scheduled days off above the thirty day limit; and the compensable straight time total.[2]

Although plaintiffs' and defendants' counsel agreed upon a tabulation sheet for each class member, 32 class members dispute the calculations. Plaintiffs' counsel requested that each of these class members provide further documentation, if any, to support their claims. Counsel has submitted what is believed to be accurate tabulation sheets for these class members and, because counsel has not obtained final approval by these individuals, requests that the Court give these individuals the opportunity to withdraw from the class if the final individual tabulations made for them are still unsatisfactory to them. *See* Forrest Aff. par. 7; *id.* Ex. B.[3]

The issues presently before the court are as follows:

(1) Whether any and all recovery is barred by the Eleventh Amendment, and if not,

(2) the amount to be paid for the first 30 days under § 242, whether at time-and-a-half or straight time;

(3) the amount to be paid for days in excess of 30;

(4) whether plaintiffs are entitled to be compensated for vacation and personal days that were used, in lieu of pass

[2]Other columns included on the tabulation sheets concern some of the issues this decision must address, to wit: non-compensable straight time total; time and one-half total; and interest awarded.

[3]Although this affidavit was filed with the Court on September 1, 1988, the number of class members disputing the tabulation sheets has apparently remained unchanged. Counsel reiterated, during a conference held in chambers on January 15, 1991, that 32 class members had still not agreed to the figures in the tabulation sheets.

days for military leave, to avoid the effects of Directive No. 2212;

(5) whether plaintiffs are entitled to prejudgment interest;

(6) whether plaintiffs are entitled to attorney's fees; and

(7) the appropriate course of action to take with respect to the 32 class members who disagree with their tabulation sheets.

Eleventh Amendment

Initially, the Court must determine whether, as alleged by the defendants, the Eleventh Amendment bars the recovery of retroactive monetary relief. The Eleventh Amendment renders a state absolutely immune from suit in federal court absent either (1) its clear and unequivocal consent or waiver, or (2) the clearly expressed intention of Congress to abrogate such immunity. As to the latter, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

If it is determined, upon review of the relevant statutory language, that Congress has unmistakably evinced its intention to abrogate the States' immunity, the next inquiry is whether Congress has the constitutional power to do so. Until *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Supreme Court had scrupulously avoided deciding whether Congress' power to abrogate states' immunity was limited to those statutes enacted pursuant to its authority under section 5 of the Fourteenth Amendment. *See, e.g., Welch v. State Department of Highways and Public Transportation,*

483 U.S. 468, 475 (1987) ("We assume, *without deciding or intimating a view of the question*, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment.") (emphasis added); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985) (assuming, without deciding, that Congress can abrogate the States' Eleventh Amendment immunity by enacting the 1793 Nonintercourse Act pursuant to its power under the Commerce Clause).

In *Union Gas*, in a plurality opinion written by Justice Brennan and joined by 3 other justices, including Justice Marshall, the Court upheld Congress' abrogation of the States' Eleventh Amendment immunity through the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § § 9601-9675, and its "SARA" amendments. These statutes and amendments were enacted pursuant to Congress' Commerce Clause power. Justice White, in a separate opinion concurring in part and dissenting in part, "agree[d] with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress had the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." 491 U.S. at 57.

As the law presently stands, then, the Supreme Court has held, however temporarily, that Congress' power to abrogate the States' Eleventh Amendment immunity is not limited solely to those statutes enacted pursuant to its authority under section 5 of the Fourteenth Amendment. It is worth noting that every federal appellate court to have addressed the question has found that Congress may subject the States to suit in federal court when Congress acts pursuant to its plenary powers. *See, e.q., In re McVey Trucking*, 812 F. 2d 311, 316 (7th Cir. 1987), *cert. denied sub nom., Edgar v.*

McVey Trucking Co., 484 U.S. 895 (1987) ("[W]e conclude that because Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court under its Fourteenth Amendment power, it may do so under any of its plenary powers"); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (congressional power over extradition, Art. IV, § 2, cl. 2); *Mills Music, Inc. v. Arizona*, 591 F. 2d 1278, 1285 (9th Cir. 1979) (copyright and patent clause, Art. I, § 8, cl. 8).

More pertinent to the present discussion, the provisions involved in this case, 38 U.S.C. § § 2021-2026, have been upheld against Eleventh Amendment challenges by state-defendants. *See, e.g., Reopell v. Commonwealth of Massachusetts*, 936 F. 2d 12 (1st Cir. 1991), *cert denied*, 60 U.S.L.W. 3418 (December 9, 1991) (Congress' abrogation of state's immunity proper under War Powers Clause, Art. I, § 8, cl. 11-13); *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979) (same); *Jennings v. Illinois Office of Education*, 589 F. 2d 935, 942 (7th Cir. 1979), *cert. denied* 441 U.S. 967 (1967) (same).

Santiago v. New York State Department of Correctional Services, 945 F.2d 25 (2d Cir. 1991) contains the Second Circuit's most recent pronouncement on the issue of Congress' power to abrogate a state's Eleventh Amendment immunity. Plaintiff Santiago sued Corrections under 42 U.S.C. § § 1981, 1983 and 1985 (3), as well as under Section 1 of the Fourteenth Amendment, for emotional damages, litigation costs, and an injunction. In rejecting the plaintiff's claims (1) that ratification of the Fourteenth Amendment somehow worked a repeal of the earlier Eleventh Amendment, and (2) that section 1 of the Amendment satisfied the "clear statement" exception to immunity, the

court considered itself constrained by rulings of the Supreme Court in the area. The Circuit stated:

> [T]he [Supreme] Court has *to this date* only sanctioned actions for damages arising from a state's violation of the Fourteenth Amendment when Congress has acted under § 5 of the Amendment to "enforce" its sections with "appropriate legislation" which allows for such a federal remedy. In the absence of Congressional action under § 5, the Court *has not* recognized Fourteenth Amendment abrogation of the Eleventh Amendment, such as would permit an action for damages against a state in federal court.

Id. at 28 (emphasis added).

Although the Circuit rejected Santiago's claims, that court clearly avoided stating that it *would not* allow actions for damages against a state where a statute is enacted pursuant to Congress' other powers, *e.g.*, its War Powers. *Santiago* can be read simply as the Circuit's statement that abrogation of immunity *under the Fourteenth Amendment* is limited (or has, to date, been limited) to those statutes enacted under section 5 of the Fourteenth Amendment.

Curiously, the opinion omits any mention of *Union Gas*, leaving little doubt that the court did *not* decide that Congress lacks authority, pursuant to its plenary powers, to abrogate the States' Eleventh Amendment immunity. Given that (1) other circuit courts of appeal have upheld the Act here in question, (2) the Second Circuit has not specifically addressed the issue, and (3) the Supreme Court has, albeit tenuously, approved of abrogation by Congress of the States' Eleventh Amendment immunity where Congress ac-

ted under its Commerce Clause power, this Court holds that the suit in the present case is not barred by the Eleventh Amendment.[4]

Having found that the relief requested is not barred by the Eleventh Amendment, it is necessary to compute the damages.

Amount Due on First 30 Military Days Under N.Y. MIL. LAW § 242

Under New York law,

> [e]very public officer or employee shall be paid his salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year. . . .

N.Y. MIL. LAW § 242. Pursuant to this provision, where a person is required to perform military duty on a scheduled work day, the person is entitled to compensation from the employer for that day as though he or she had worked as scheduled. The employee is so compensated up to a maximum of thirty such days per year.

In addition, plaintiffs cite a provision of the collective bargaining agreement which states that "[t]ime during

[4]Finding that Congress had the authority to abrogate the immunity, it is not necessary to reach plaintiffs' alternative contention that the defendants may have waived their Eleventh Amendment immunity in their papers in response to plaintiffs' motion for a preliminary injunction and their motion papers for an order pursuant to 9 U.S.C. § 3.

which an employee is excused from work because of . . . other leave at full pay shall be considered as time worked for the purpose of computing overtime." Pl. Mem. at 2 (quoting Article 15.1(g) of Collective Bargaining Agreement [Pl. Trial Ex. 6]). Plaintiffs therefore argue that, since (1) military days are compensable and count towards overtime, and (2) the rescheduling by defendants required plaintiffs to work a full five-day week in addition to the otherwise-compensable military days, then the military days should be paid at overtime rates. That is, such weeks of five work days and two military days should result in five days of regular pay and two days of overtime pay. *See* Figure A, appended to this opinion. The practical result is that plaintiffs would be entitled to recover, in this lawsuit, three more days' pay for each of such weeks.

Defendants argue that plaintiffs are not entitled to any compensation for having military drill on a day off. Defendants point to the Court's language describing the value of the pass days as "measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." *Rumsey v. New York State Dept. of Correctional Services,* No. 82-CV-979, slip op. at 14 (N.D.N.Y. Feb. 19, 1987).

A strict reading of this definition of the "damages" suffered by plaintiffs would result in the award of no damages. Had the pass days not been reassigned, plaintiffs would have worked 3 days, performed military duty for two days, gotten paid for five days, and would have had two days off. What in fact occurred was that plaintiffs worked for five days, performed military duty for two days, got paid for five days, and had no days off. So, according to the Court's definition of damages, plaintiffs would have been paid for five days' work in either case hence there are no damages.

Although defendants claim that the Court seeks to measure damages as the paid military leave plaintiffs were prevented from using, it is this Court's opinion that the measure of damages is, *in addition to the defendants' claim*, the "value" of the *days off* that the plaintiffs did not get to use. Defendants argue that, although they believe *any* payment to plaintiffs would constitute a windfall, there should certainly be no more that straight time pay for the rescheduled pass days that were used for performing military duty.

The Court finds that, for weeks such as those under the heading "Military With Rescheduling" in Figure A, the military days should be compensated at a rate of overtime, reflecting both (1) the pay plaintiffs would have received had the military days occurred on non-pass days (which would have happened absent defendants' rescheduling), and (2) that, since plaintiffs worked five full days and had two military days that, absent rescheduling, would have been compensable, the military days should count towards overtime for those weeks, in accordance with provisions of the collective bargaining agreement. As a practical matter, such calculation serves to compensate plaintiffs for the additional work days and for the loss of pass days for that week.[5]

Amount Due on Military Days After
30 Days Under N.Y. MIL. LAW § 242

As to the pass days rescheduled to coincide with military days when the plaintiffs had already performed military duty for the compensable maximum of thirty days in any year, defendants claim that the plaintiffs actually *benefitted* from the rescheduling policy. In such cases, plaintiffs would

[5]In addition, plaintiffs assert that Article 15.4 of the contract entitles each employee to a $3.50 meal allowance for each pass day that he worked or was required to work. The Court so finds.

otherwise have been able to work only three days for that week, and would have gotten paid for three days. *See* Figure B, appended to this opinion, under heading entitled "Military Without Rescheduling." Plaintiffs "benefitted" because they were given the opportunity to work for five days, receiving pay for those days, when they would otherwise have been able to work only three days.

Defendants do not address the fact that plaintiffs may have *preferred* to have the days off anyway, even if they would only get paid for three days for that week. Once again the issue is really the value of the days off that plaintiffs were not allowed to have due to the rescheduling. Plaintiffs argue that days off are "incidents and advantages" of employment and should be compensable, though at a lower rate than the first 30 rescheduled days compensable under § 242.

Plaintiffs cite the *Boas* settlement in support of the claim that rescheduled days off should be compensated at an overtime rate. Plaintiffs then calculate the purported damages suffered when pass days were rescheduled to coincide with what would have been *non*-compensable military days. The equation offered by plaintiffs consists of pay for pass days rescheduled for compensable military days, that is, time and a half, minus straight time for each non-compensable military day. This results in an award of one-half day's pay per each pass day rescheduled to coincide with what would have been a non-compensable military day.

Not surprisingly, defendants counter that, even were this Court to award damages for the compensable military days, this latter proposal constitutes a windfall. This Court finds unpersuasive, if not incredible, defendants' claim that plaintiffs somehow benefitted from the rescheduling policy when pass days were rescheduled to coincide with non-compensable military days.

The Court also finds, however, that, since plaintiffs were not entitled to payment for military days beyond the thirty compensable under § 242, any amount awarded for rescheduled days beyond the thirty compensable days would be based upon an arbitrary and amorphous conclusion as to the "value" of a pass day, or the value of the day each plaintiff would have "preferred" to be a pass day. The Court therefore holds that any recovery is limited to the first thirty days compensable under the Military Law. The salary plaintiffs would have been paid, had these pass days not been reassigned and plaintiffs had been granted military leave, would have been zero dollars. The court does not find that a non-compensable military day somehow turns into an overtime day because of the rescheduling policy.

Personal Leave and Vacation Leave

Plaintiffs also claim that, following the issuance of Directive No. 2212, some class members, to maintain their scheduled pass days, did not apply for military leave but instead took vacation and personal days on the days they were required to attend military duty. Plaintiffs argue that the issuance of the Directive constituted an anticipatory breach of the collective bargaining agreement, under which plaintiffs had the right, based upon seniority, to bid for a job which included specific pass day schedules. Plaintiffs further claim that the use of leave and vacation days was in mitigation of the damages caused by the Directive, and therefore plaintiffs are entitled to one day's pay for each leave and vacation day used to avoid the rescheduling of regularly scheduled days off.

In their Reply Memorandum, defendants argue that the doctrine of anticipatory breach has no application to this situation. Second, defendants claim that the real issue is one

of causation. The Directive did not announce a policy of changing *all* pass days at all times in the future, but stated instead that, "*when practicable and consistent with the Department's personnel requirements*, regular days off and shift assignments *may* be revised to avoid military drills during scheduled working hours." *Rumsey v. New York State Dept. of Correctional Services*, No. 82-CV-979, slip op. at 2 (quoting Directive No. 2212) (emphasis added). As a practical matter, it may be true that regular days off were *always* rescheduled, but the language of the Directive itself was not mandatory.

Defendants further argue that such "damages," if acceptable in theory, are nevertheless too speculative for actual calculation. Plaintiffs counter by stating that, as reflected in the Exhibits to the Forrest affidavit and reply affidavit, 198 plaintiffs claim that they took their accrued vacation days, sick days or personal days in lieu of applying for military leave. Plaintiffs state that such claims would be easily verifiable by comparing the employee time records and military records of these 198 plaintiffs to determine when a plaintiff took a vacation day, a personal leave day or a work day and also attended military drill. *See* Pl. Reply Brief at 11.

Plaintiffs further state that, should the Court find such days compensable, plaintiffs would still be subject to the restrictions of N.Y. MILITARY LAW § 242 limiting paid military leave days to 30 calendar days. *Id.*

Since it is reasonably clear that the language of the Directive, not being mandatory, is not sufficient to warrant a finding of anticipatory breach, plaintiffs are essentially claiming no more than that they were "anticipatorily" mitigating damages that *may have* occurred had they not used their vacation days. On the other hand, it is clear that, although the Directive did not *require* rescheduling, such rescheduling was done as a matter of course. Plaintiffs

could, therefore, notwithstanding the lack of mandatory language in the Directive, count on rescheduling as a practical matter.

The Court therefore finds that such days, if proven by a comparison of employee time records and military records, be counted toward the satisfaction of the 30 days allowed under N.Y. MILITARY LAW § 242.

Prejudgment Interest

The statute here at issue is silent with respect to the award of prejudgment interest. "Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts." *Waterside Ocean Navigation Co., Inc. v. International Navigation, Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984) (quoting *Lodges 743 and 1746, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 [1976]); *Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 129 (2d Cir. 1985). Prejudgment interest has been awarded in cases arising, as does the instant case, under the Veteran Reemployment Rights Act. *See, e.g., Hanna v. American Motors Co.*, 724 F.2d 1300, 1310-1312 (7th Cir. 1984), *cert. denied*, 467 U.S. 1241 (1984); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 430 (5th Cir. 1981); *Accardi v. Pennsylvania Railroad Co.*, 369 F.2d 805 (2d Cir. 1966) (*per curiam*); *Peel v. Florida Dep't of Transp.*, 500 F. Supp. 526, 528 (N.D. Fla. 1980) (and cases cited therein), *aff'd*, 600 F.2d 1070 (5th Cir. 1979).

Generally, a presumption exists in favor of such award, and prejudgment interest should be granted absent equitable

reasons sufficient to overcome the presumption. *Waterside*, 737 F.2d at 154 ("In these days in which all of us feel the effects of inflation, it is almost unnecessary to reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss."). However, "such factors as inordinate delay in prosecution of a suit or wrongdoing by the plaintiff could well give a district court pause before awarding prejudgment interest." *United Aircraft*, 534 F.2d at 447.

In the present case, there is no evidence that plaintiffs were dilatory in the prosecution of the suit, nor of any other wrongdoing by plaintiffs. Defendants argue that prejudgment interest is not needed here to make plaintiffs whole, because plaintiffs did not lose any wages through the implementation of the Directive. Defendants claim that any award of prejudgment interest would amount to a penalty to the defendants and a windfall to the plaintiffs.

This Court is not persuaded by defendants' arguments. Plaintiffs lost the value of the pass days, which value has now been determined in earlier portions of this opinion. Plaintiffs were entitled to the value during the period between the implementation of Directive No. 2212 and the entry of judgment. The provision of prejudgment interest remains merely part of the remedy necessary to make plaintiffs whole again. Plaintiffs' request for prejudgment interest is therefore granted.[6]

[6]In *Reopell v. Commonwealth of Massachusetts*, cited *supra*, the First Circuit explicitly held that prejudgment interest can be considered an element of the relief provided for in § 2022:

> We accordingly conclude that, by its express direction in the VRRA to "compensate" persons for any unlawful loss of wages or benefits caused by state employers, Congress intended to empower courts to award prejudgment interest.

Attorneys' Fees

Plaintiffs seek attorneys' fees pursuant to 42 U.S.C. § 1988. Initially, the Court is reminded that the complaint alleged violations of (1) the Veterans' Reemployment Rights Act ("VRRA"), 38 U.S.C. §§ 2021 through 2026, (2) N.Y. MILITARY LAW § 242, and (3) 42 U.S.C. § 1983. The third claim involved allegations that the Directive violated plaintiffs' rights under equal protection. Plaintiffs also specifically invoked 42 U.S.C. § 1988, seeking attorneys' fees.

In resolving the case in plaintiffs' favor, this Court found that the defendants violated 38 U.S.C. § 2021(b)(3) by denying plaintiffs an incident or advantage of their employment because of their military obligations. *See Rumsey v. New York State Dept. of Correctional Services*, No. 82-CV-979, slip op. at 13 (February 19, 1987). The Court did not reach the § 1983 claim.

The VRRA does not specifically provide that attorneys' fees are to be awarded to the prevailing party. The Act does state, however, that "[n]o fees or court costs shall be taxed against any person who may apply for such benefits." 38 U.S.C. § 2022.

Plaintiffs argue that, under the authority of *Maher v. Gagen*, 448 U.S. 122 (1980), they are entitled to attorneys' fees under § 1988 even though the § 1983 claim was not decide in their favor. The *Maher* plaintiff sued the Commissioner of Income Maintenance for the state of Connecticut, claiming that Connecticut's AFDC regulations violated the Social Security Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiff further alleged that relief was authorized under § 1983. 448 U.S. at 125.

The *Maher* court held that the award of attorneys' fees is not limited to cases in which § 1983 is invoked as a remedy

for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights. Citing the legislative history of § 1988, the Court stated:

> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> "To the extent a plaintiff joins claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. [citation omitted]. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers*

> *v. Gibbs, supra,* at 725." H.R. Rep. No. 94-1558, p. 4, n.7 (1976).

Id. at 132-133 n. 15; *see also Maine v. Thiboutot,* 448 U.S. 1, 4, 9 (1980) (since "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law," "and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit.").

In opposition to plaintiffs' attorneys' fee request, defendants cite *Smith v. Robinson,* 468 U.S. 992 (1984). The *Smith* plaintiffs had alleged that certain state regulations violated the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1400 *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Rhode Island state law. *See id.* at 998. The district court found for the plaintiffs, and awarded attorneys' fees pursuant to § 1988, finding (1) that plaintiffs had alleged equal protection and § 1983 claims as well as the EHA claim, and (2) that the equal protection claim was colorable and nonfrivolous. *Id.* at 1001-1002.

The First Circuit reversed the grant of attorneys' fees, stating that the EHA did not provide for attorneys' fees, and, because of the comprehensiveness of the EHA, Congress could not have intended its omission of attorney's fees relief to be rectified by recourse to § 1988. *Id.* at 1003.

The Supreme Court, affirming the First Circuit's denial of attorneys' fees, held that § 1988 attorneys' fees are not available where the § 1983 claims are virtually identical to the statutory claims, *and* Congress has intended the statutory scheme to be the exclusive avenue through which a plaintiff may seek relief. *See id.* at 1009. Stating that the Act "establishes an elaborate procedural mechanism to protect

the rights of handicapped children," *id.* at 1010-1011, and that "[t]he crucial consideration is what Congress intended," *id.* at 1012, the Court found that,

> [i]n light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate education.

Id. at 1011.

A review of these cases counsels the following inquiry:[7] First, whether the plaintiff prevailed on the constitutional or the statutory claim. Second, if plaintiff prevailed on the statutory claim, whether that claim, as well as the constitutional claim, arose from a common nucleus of operative facts. Third, whether the constitutional claim was "substantial" or "nonfrivolous" as determined under *Hagans*. Fourth, whether the statutory scheme is sufficiently detailed and pervasive that it would fall under *Smith* such that Congress, having failed to provide for attorneys' fees in the statute itself, could not have intended its omission of an attorneys' fees provision to be rectified by recourse to § 1988.

The first and second issues are the easiest. As stated *supra*, this Court found for plaintiffs on the statutory

[7]This assumes of course, that the statute at issue does not provide for attorneys' fees, as is the case here.

ground, specifically, 38 U.S.C. § 2021(b)(3). All claims here arose from a common nucleus of operative facts, to wit, the effect of the Directive on plaintiffs' work schedules.

The third issue, whether the constitutional claim was "substantial," is hotly contested by the parties. In *Hagans*, the Court, which defined "substantiality" in terms of whether a claim was sufficient for the court to exercise jurisdiction, quoted approvingly a prior decision where the question of substantiality arose in the context of convening a three-judge court under 28 U.S.C. § 2281:

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Exparte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Exparte Poresky, supra* [290 U.S. 30], at 32 [(1933)] ....

415 U.S. at 537-538. The *Hagans* court found the constitutional claim there presented to meet the substantiality test in part because "[w]e are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other." *Id.* at 539.

In the present case, plaintiffs alleged that, notwithstanding the applicability of the "minimum scrutiny" analysis, under which the government need only show that the Directive was rationally related to a legitimate government objective, their rights to equal protection were violated because the targeting of only those corrections guards with military duty for work rescheduling was irrational. Defendants respond that plaintiffs were "targeted" because no other employees had a type of leave similar to the military leave, for which the state would have to compensate even though no work was provided for that day. Defendants distinguish all the other employees who might have taken vacation or personal days, since the state would have in any event had to pay them for those days. The state would not have saved money by targeting such employees, whereas, by rescheduling military leave days to RDO's, the state did not have to pay the plaintiffs a day's pay for no day's work.

Notwithstanding the defendant's purported "rationality" supporting the Directive, reaching the merits of the equal protection claim presupposes its "substantiality."[8] That is,

---

[8]The *Hagans* court further stated that the reasoning of the Court of Appeals in that case, finding the equal protection claim there to be non-meritorious,

> may ultimately prove correct, but it is not immediately obvious from the decided cases or so 'very plain' under the Equal Protection Clause. We think the admonition of *Bell v. Hood*, 327 U.S. 678 (1942) should be followed here:

(Footnote continued on next page.)

if the Court can exercise jurisdiction over the case to decide the merits, the case is sufficiently "substantial." Applying the test to plaintiffs' equal protection claim here, even were the Court to ultimately determing that it was not meritorious, it cannot be said that the claim is "insubstantial."

The fourth step in the inquiry is to determine whether the statute at issue fits within the parameters of *Smith*. A reading of 38 U.S.C. § 2022, outlining the enforcement procedures under the VRRA, reveals that it does not create nearly as comprehensive an enforcement scheme as that provided in the EHA. Neither "the provisions of the statute and its legislative history indicate that Congress intended [veterans] with constitutional claims ... to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the [statute]." *Smith*, 468 U.S. at 1009.

Given that the constitutional claims here at issue were not insubstantial, and that the VRRA, not as comprehensive as, for example, the EHA, does not thereby preclude the invo-

---

(Footnote continued.)

> "Jurisdiction ... is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Id.*, at 682 (citations omitted.)

415 U.S. at 542.

cation of § 1983 nor therefore § 1988, plaintiffs' request for attorneys' fees under § 1988 is granted.

Class Members Not Agreeing With Calculations

Finally, the Court must determine the proper course to take with respect to those class members who have not communicated to counsel their agreement with the calculation of pass days and compensable straight time. Plaintiffs' counsel recommends, and the Court so orders, that these individuals be given the opportunity to opt out of the class.

s/Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

DATED: Albany, New York
December 31, 1991

FIGURE A[9]

UP TO 30 DAYS UNDER NEW YORK MILITARY LAW

	M	T	W	Th	F	Sat	Sun	Days Paid
Regular Schedule	O	O	X	X	X	X	X	5
Military Without Rescheduling	O	O	X	X	X	M	M	5 (3 + N.Y. Stat.)
Military With Rescheduling	X	X	X	X	X	M	M	Plaintiffs: 5 @ reg. pay +2 OT =8 days' pay Defendants: 5 @ reg. pay

FIGURE B[10]

AFTER 30 DAYS UNDER NEW YORK MILITARY LAW

	M	T	W	Th	F	Sat	Sun	Days Paid
Regular Schedule	O	O	X	X	X	X	X	5
Military Without Rescheduling	O	O	X	X	X	M	M	3
Military With Rescheduling	X	X	X	X	X	M	M	Plaintiffs: 5 @ reg. pay +2 @ ½ pay =6 days' pay Defendants: 5 @ reg. pay

[9] "X" = work day
"O" = pass day
"M" = military day

[10]
"X" = work day
"O" = pass day
"M" = military day

APPENDIX E—Memorandum Decision and Order of the United States District Court, Northern District of New York, Entered February 19, 1987

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN III, as Commissioner of the New York State Department of Correctional Services,

Defendants.

82-CV-979
Filed: 2/19/87
Entered: 2/19/87

Appearances:

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Con. G. Cholakis, D.J.

Of Counsel:

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Alan S. Kaufman, Ass't Attorney General

MEMORANDUM-DECISION and ORDER

Plaintiff class consists of approximately 520 Correction Officers, Sergeants or Lieutenants employed by the Department of Correctional Services of the State of New York since March 30, 1982, and who are or were also members of the National Guard of the State of New York or another reserve component of the Armed Forces of the United States of America since the same date.

As part of their military obligations, plaintiffs are required to fulfill certain training schedules throughout the year. In an avowed attempt to avoid reducing its manpower during these training schedules, defendant, Department of Correctional Services, issued Directive No. 2212 on March 30, 1982, (plaintiffs' exhibit No. 13), requiring all correction officers with military obligations to furnish their super-

visors with quarterly military training schedules. The directive further provides:

> [t]he Deployment Lieutenant/Attendance Control Office will review the quarterly training schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, *regular days off and shift assignments may be revised to avoid military drills during scheduled working hours* (emphasis added).

Pursuant to this provision, the Department has revised the days off and shift assignments of correction officers to avoid military drills during scheduled working hours. It is this implementation of Directive No. 2212 that is in issue in the current action.

Plaintiffs allege that the directive violates their rights under the collective bargaining contract (plaintiffs' exhibit No. 6), under 38 U.S.C. §§ 2021(b)(3) (1981 & Supp. 1986) and 2024(d) (1981) and under N.Y. Military Law § 242 (1953 & Supp. 1987). Defendants allege they have the right to make the shift and days off changes under paragraphs 15.3 and 24.3 of the collective bargaining contract.

Before addressing each party's contentions, it is necessary to review the practices which have been followed by the parties relative to job, shift and days off assignments. It is conceded by all concerned that management decides what its requirements are in order to properly perform its duties and responsibilities. In furtherance of these obligations, management prepares and posts job descriptions containing the following information:

1) the work shift,
2) the work location, and

3) the work-pass day schedule.

It is clear that these items are presented as a single package which the correction officers bid on in its entirety. They may not bid on each item individually. Therefore, before bidding a particular job package, an employee may consider each component of the package. Which of the components becomes the deciding factor remains up to the individual officer. The job is then assigned to the most senior officer bidding the job who has the ability to perform it (para. 24.3 of the Contract). Once the successful bidder awarded a job package, his rights and privileges are determined by statute and the collective bargaining agreement.

It is item no. 3 above, the work-pass day schedule, which is the focus of the current dispute. While an employee is assigned to work a particular shift at a particular location, the days which he will work and the days that he will have off (pass days) are determined by the so-called 'squad' to which he is assigned. Apparently, several employees can work the same shift at the same work location but, according to the work-pass day squads to which they are assigned, work different days of the week and have different days off. Once an employee is assigned to a particular work-pass day squad, his work days and his pass days are set and can be computed by him for as long as he remains on that job package.

Following a four day non-jury trial of the issues, the court makes the following findings of fact:

1) Security Unit Employees Council 82, American Federation of State, County and Municipal Employees, AFL-CIO, is a duly organized Labor Union representing the plaintiffs.

2) The State of New York and Council 82 signed their first collective bargaining agreement on July 17, 1970 which convered the period beginning April 1, 1970 and ending March 31, 1972 (plaintiffs' exhibit No. 1).

3) The State of New York and Council 82 have entered into additional bargaining agreements covering successive years (plaintiffs' exhibits Nos. 2 - 11).

4) Prior to the parties' first collective bargaining agreement, the assignment of pass days varied. Pass days were assigned and changed by individual watch commanders as required.

5) An employee's pass days were not normally or customarily changed following the signing of plaintiffs' exhibit No. 1 until 1982.

6) Directive No. 2212 (plaintiffs' exhibit No. 13) concerning Military Leave was issued on March 30, 1982.

7) Pursuant to said Directive, plaintiffs were to furnish their watch commanders/supervisors with their Military Training Schedules.

8) Whenever any National Guardsman's/Reservist's military training obligation fell on a regularly scheduled work day, that employee's pass days were re-scheduled to fall on his military training days.

9) Defendants have regularly and consistently followed this practice since the issuance of Directive No. 2212.

10) The rescheduling of pass days has been without the consent of the plaintiffs.

11) Defendants' purpose in rescheduling pass days is two fold;

    a) to provide the increased manpower to fulfill the duties mandated by law,

    b) thereby reducing overtime compendation (plaintiffs' exhibit No. 16).

12) Prior to the issuance of Directive No. 2212, plaintiffs were not required to change their pass days to coincide with their military training days.

13) No other employee's pass days are regularly or consistently changed.

Plaintiffs rely on those portions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 which are now found in 38 U.S.C. §§ 2021 (1981 & Supp. 1986) and 2024 (1981). These sections are intended to protect a returning veteran, whether he was an inductee (§ 2021), or an enlistee (§ 2024), and allow him to regain, within certain limits, the employment he left to serve his country. An employee returning to work after active service with the Armed Forces of the United States "shall not be denied retention in employment or any promotion or other incident or advantage of

employment because of any obligation as a member of a Reserve component of the Armed Forces", 38 U.S.C. § 2024 (b)(3), and he "shall upon request be granted a leave of absence by such person's employer for the period required to perform . . . inactive duty training in the Armed Forces of the United States", 38 U.S.C. § 2024 (d).

While these sections also contain subdivisions intended to protect veterans while serving as members of a Reserve component of the Armed Forces, it is clear that they also apply to National Guardsmen. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 551 n.2 (1981). In *Monroe*, the Supreme Court held that these sections are intended to protect the National Guardsman/Reservist from being discriminated against, but they are not intended to place him in a favored status. He must be treated equally and receive the same benefits as other employees receive but no additional benefits. In the instant case plaintiffs, along with all other correction officers, sergeants and lieutenants, receive their allotted number of days off, but, because of their military leave, they do not necessarily receive them on the same days as other members of their squads.

A review of the employment contracts is necessary in order to determine what value, if any, it places on pass days. The employment contracts in effect when Directive No. 2212 was issued contained the following language:

> Seniority shall be the basis by which employees shall select pass days.

Plaintiffs' exhibit No. 6 (governing the Security Services Unit which is composed of Correction Officers and Sergeants) and plaintiffs' exhibit No. 10 (governing the Security Supervisors Unit which is composed of Correction Lieutenants) at paragraph 24.2.

Defendants allege that paragraph 24.2 is superceded, and in effect voided, by paragraph 24.6 of the same contract which reads:

> Nothing contained in paragraph 24.2 of this Article shall prevent mutually agreed to local arrangements regarding the method that pass days are to be selected.

All parties concede that employees do not bid on pass days individually, but that they bid on a job package which contains, in addition to other items, their pass days. It is also undisputed that the job packages are awarded according to seniority. The court finds that pass days, in addition to work shift and work location, are selected on the basis of seniority. While no clear authority has been presented by either side, this Court cannot conclude that paragraph 24.2 is abrogated by the method of bidding which has become the parties' practice.

Paragraph 24.3 of these contracts allows the defendants the right to make any job or shift assignment necessary to maintain the services of the department involved. This paragraph reads:

> [t]he Employer shall have the right to make any *job* or *shift assignment* necessary to maintain the services of the department or agency involved. However, job assignments and shift selection shall be made in accordance with seniority provided the employee has the ability to properly perform the work involved. Before making a permanent assignment the Employer shall post all permanent vacancies in shifts or job assignments for a period of 30 days during which employees may bid. Grievances aris-

> ing under this paragraph shall be processed up to Step 3 of the grievance procedure but not to arbitration (emphasis added).

While the conditions which must exist before these assignments can be made are not set forth, it is clear that such assignments must be made according to seniority. The paragraph does not mention pass days. Had the parties intended, by this paragraph, to give the Employer the right to change pass days, they could easily have included this provision. *See, Neuman v. Pike,* 591 F.2d 191, 194-95 (2d Cir. 1979). Defendants' argument that pass days were intended to be included within the term "shift" is belied by paragraph 24.5 which specifically differentiates between the terms "shift" and "pass day[s]" and thereby recognizes that they are distinct and separate items:

> [t]he shift and pass day provisions of this Article shall not apply to those departments or agencies whose employees function on a rotating shift basis.

It is a well established rule of contract interpretation that "a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect[.]" *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (and cases cited therein).

Defendants further allege they have the right to change plaintiffs' pass days to avoid the payment of overtime, provided they are given the notice provided in paragraph 15.3(a), (b) & (c) of the contract which reads:

> No employee shall have his *shift schedule changed for the purposes of avoiding the payment of overtime*, unless he has been notified of such change one week in advance of the time in which the changed work period is to begin provided, however, that the circumstances necessitating such change are foreseeable prior to such one-week period.
>
> In the event that circumstances necessitating such shift changes are not foreseeable, then such notice shall be given as soon as possible.
>
> In the event such notice of shift change is not given at least 48 hours prior to the starting time of the scheduled shift which the employee is directed to work such employee shall not be deprived of the opportunity to work his normal shift and to be paid overtime for the hours worked in excess of 40 hours in the workweek (emphasis added).

It is therefore clear that the Employer has the right to make any shift schedule changes necessary to maintain the service of any department and may do so even if his purpose is the avoidance of overtime payment, provided the employee is notified within the time periods set forth above. Although there was no clear proof presented as to how the change of plaintiffs' pass days resulted in an avoidance of payment for overtime, the parties agree that overtime is affected, even though the overtime of the particular National Guardsman/Reservist whose pass days are being changed may not be affected. Additionally, Commissioner Coughlin in his August 9, 1982 letter to N.Y.S. Assemblyman Robin L. Schemminger indicated that the changes here

contested, together with other controls, would result in a reduction of overtime costs (plaintiffs' exhibit No. 17).

Paragraphs 15.3(a)(b) & (c) refer only to shift schedule changes and not to pass day changes. The changing of pass days is referred to in paragraph 15.3(e) which reads:

> Regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime.

While this paragraph is clear and unambiguous, defendants allege that it does not apply because days off are not scheduled until they are posted. It is "well established in New York that, where the expressed intention of the parties is clear, a contrary intent will not be created by implication." *Neuman v. Pike*, 591 F.2d 191, 194 (2d Cir. 1979). Therefore, as no authority has been submitted for defendants' position, it is rejected.

Additionally, defendants' position is belied by their own actions. In preparation for the negotiations which resulted in the 1979-82 contract (plaintiffs' exhibit No. 5), defendants submitted their contract demands on or about December 20, 1978 (plaintiffs' exhibit No. 28). These demands proposed to delete paragraph 15.3(e) from the contract entirely. Defendants' demand was not met and the ensuing contract contained the objectionable paragraph.

Later, in preparation for the negotiations which resulted in the 1985-88 contract (plaintiffs' exhibit No. 7), a time subsequent to the issuance of Directive No. 2212, defendants submitted contract demands on or about March 8, 1985 (plaintiffs' exhibit No. 31). In the following terms, defendants submitted a demand that sought to change the offending paragraph:

> regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime *unless done at least one week in advance of the changed date, except in the event of unforeseeable circumstances* (emphasis in original).

The ensuing contract again failed to contain the requested addition.

Given the history of negotiations with respect to this contract, it is clear that defendants were well aware that regularly scheduled pass days could not be changed with impunity, and this court so finds. Additionally, this court finds that the assignment to a work-pass day squad results in regularly scheduled pass days for as long as that employee remains a member of that squad and it is not necessary that the pass days be posted before paragraph 15.3(e) comes into play. The court therefore concludes that plaintiffs' right to the pass days that they bid is protected by paragraphs 15.3(d) and 24.2 of the collective bargaining agreement and that paragraphs 15.3(a) and 24.3 do not give the defendants the right to re-assign plaintiffs' pass days to coincide with their military leave days. The court further concludes that, as a result of defendants' actions, the plaintiffs have been denied an incident or advantage of their employment because of their military obligations in violation of 38 U.S.C. §2021(b)(3).

Having decided that defendants acted improperly, we must now determine what, if any, remedy is available to plaintiffs. Section 2022 of Title 38 provides that the court can "specifically . . . require such employer . . . to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action". There is no allegation or proof that the plaintiffs suffered any direct loss of wages as a result of the reassignment of their

pass days. They did, however, lose their pass days, thereby suffering a loss of benefits. In order to determine the extent of the loss we must look to § 242(5) of New York Military Law which reads:

> [e]very public . . . employee shall be paid his salary or other compensation as such public . . . employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year . . .

The underlined phrase was added by the New York State Legislature and became effective on June 5, 1984.

Thus, it is clear that plaintiffs lost the value of their pass days, which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave. The parties are therefore directed to review all personnel records and agree, whenever possible, as to the following items for each plaintiff during each calendar year since March 30, 1982:

1) the number of pass days reassigned pursuant to Directive No. 2212; and

2) the wages that each plaintiff would have received for the days he or she was on military duty had he or she been granted military leave for the maximum period allowed by § 242.

The parties are further directed to compile a list of those plaintiffs about whom there is disagreement, stating the areas of disagreement, and if any, the areas of agreement.

Additionally, the parties are directed to contact the court within 60 days of the date of this order so that a time might be set for completion of this matter.

IT IS SO ORDERED.

Dated: February 19, 1987
Albany, New York

s/Con. G. CHOLAKIS
U.S. District Judge

(2)

No. 94-191

FILED
AUG 30 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and PHILIP COOMBE, JR., as Acting Commissioner of the New York State Department of Correctional Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: August 26, 1994

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Question Presented

Whether a State employer's practice of rescheduling employees' days off to correspond with dates of those employees' military reserve training obligations, undertaken in response to documented abuse of military reservists' privileges by employees, violates the Veterans' Reemployment Rights Act (38 USC §§ 4301, *et seq.*).

Parties

The parties to the proceeding below were:

1. Lee S. Rumsey, Plaintiff;

2. Douglas DiGerlando, Plaintiff;

3. Michael Rhodes, Plaintiff;

4. Thomas Graves, Plaintiff;

5. New York State Department of Correctional Services, Defendant;

6. Thomas Coughlin, III, as Commissioner of the New York State Department of Correctional Services, Defendant.

Plaintiffs Rumsey, DiGerlando, Rhodes, and Graves brought suit individually and as representatives of a class of persons similarly situated.

Commissioner Coughlin retired from his position as Commissioner of the New York State Department of Correctional Services effective August 11, 1994. Philip Coombe, Jr., who is currently Acting Commissioner of Correctional Services, has been substituted as a respondent in this matter pursuant to Supreme Court Rule 35.3.

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No. 94-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and PHILIP COOMBE, JR., as Acting Commissioner of the New York State Department of Correctional Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

Petitioners in this matter are employees of respondent Department of Correctional Services (Department) and are also members of the New York State National Guard or

other reserve units of the United States Armed Forces. In their capacity as military reservists, petitioners are obliged to fulfill various annual training requirements, generally consisting of weekend drills and an annual two-week summer training session. Prior to March 1982, on occasions when their military obligations arose on scheduled work days, Department employees who were military reservists or National Guard members were permitted to fulfill those obligations upon notice to their supervisors. Under New York State Military Law § 242(5), these employees received payment for scheduled work days on which they were obliged to perform military service, up to a maximum of thirty days each year. On occasions when an employee's military obligation arose on a pass day (day off), the employee served the obligation without payment.

In March 1981, upon the receipt of several complaints from correctional facility administrators concerning abuses in the system of paid military leave, the Department conducted a statewide internal investigation of the leave issue. Problems examined during the course of the investigation included staff shortages at facilities, pressures on staff caused by excessive mandatory overtime, and excessive overtime costs to the Department. An audit conducted during the course of the investigation revealed problems including: failure of employees to report to ordered military drills after being granted leave by the Department; employees calling in sick to military drills and failing to notify the Department; employees departing early from military drills without notifying the Department; and employees no longer in the military submitting false orders authorizing

military leave (JA44).[1] In the course of the audit, approximately 47% of 245 examined leave cases were found to be undocumented (JA44).

In consequence of these problems with military leave practices, the Department issued Directive 2212 on March 30, 1982, setting forth a variety of procedures for requesting, approving and verifying the use of paid military leave by Department employees. The Directive provided, *inter alia*, that the Department (JA735):

> will review the quarterly training [military] schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, regular days off and shift assignments may be revised to avoid military drills during scheduled working hours.

The goals of Directive 2212 were mitigation of abuse of paid military leave, reduction of global overtime and other costs caused by absenteeism through such abuse, minimization of recourse to use of vacation and personal leave for military duties, and maintenance of the fullest possible complement of Department employees at facilities throughout the State.

In September 1982, petitioners commenced an action against respondents alleging that the rescheduling practice pursuant to Directive 2212; (1) violated their collective bargaining agreement solely because of their status as reservists and therefore violated the Veterans' Reemployment

[1]References to "JA" are to pages in the Joint Appendix to the Second Circuit.

Rights Act of 1974, 38 USC §§ 2021 *et seq.* [renumbered §§ 4301 *et seq.]* (Veterans' Act); (2) violated a provision of New York State's Military Law; and (3) violated the Equal Protection Clause. Petitioners sought injunctive relief, compensation for past rescheduled pass days, and attorneys' fees.

Following trial, the district court (Cholakis, J.) issued a Memorandum Decision and Order on February 19, 1987, holding that the rescheduling policy violated a provision of petitioners' collective bargaining agreement and consequently violated 38 USC § 2021[4301](b)(3) (Petition, p 51a). The district court did not rule on petitioners' pendent Military Law claim. In a subsequent Memorandum Decision and Order dated December 31, 1991, the court awarded damages against respondents at overtime rates for each pass day rescheduled, and also awarded attorneys' fees against respondents pursuant to 42 USC § 1988 (Petition, p 26a). Finally, in a Memorandum Decision and Judgment dated March 2, 1993, the district court approved a schedule of awards to class members and retained jurisdiction for the award of attorneys' fees.

On appeal, the Court of Appeals for the Second Circuit in March 1994 affirmed in part and reversed in part the district court's order and remanded the matter to the district court for recalculation of damages (Petition, p 1a). The court concluded, *inter alia*, that: (1) the district court's holding that the rescheduling policy violated petitioners' collective bargaining agreement with the State of New York was not clearly erroneous (Petition, p 12a); but (2) the rescheduling policy did not constitute a violation of the Veterans' Act (Petition, p 16a); and (3) petitioners were not entitled to attorneys' fees under 42 USC § 1988 (Petition, pp 19a-20a).

The court also ruled, however, that the district court's award of damages was proper to the extent that such damages cured the breach of the collective bargaining agreement (Petition, p 17a).[2]

Summary of Argument

The Second Circuit rightly held that the Department's Directive, issued to curb abuses of paid military leave under State law by its employees, did not infringe upon a substantial incident or benefit of employment protected by the Veterans' Act. That holding is in full accord with this Court's precedent and the legislative purpose of the Veterans' Act, poses no conflict with decisions in other jurisdictions, and is eminently rational. Therefore, this Court's review of the matter is unnecessary and the petition for a writ of certiorari should be denied.

Argument

In *Monroe v Standard Oil Co.*, 452 US 549, 559 (1981) (employer's failure to arrange substitute work hours for reservist employee did not violate the Veterans' Act), this Court found that section 4301(b)(3) was

> enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion motivated solely by reserve status.

[2]Believing that this finding violates the Eleventh Amendment and this Court's holdings in *Pennhurst State School & Hospital v Halderman*, 465 US 89 (1984), and *Edelman v Jordan*, 415 US 651 (1974), respondents recently filed a petition for a writ of certiorari (No. 94-232) for review of this discrete issue.

The Court noted that testimony before Senate and House Committees recorded in the legislative history of the Act (452 US at 562, emphasis in original)

> made it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable *adverse* treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment.

The Court further noted (452 US at 563 [footnotes omitted]):

> And certainly there is nothing in the legislative history that would indicate Congress intended that reservists were to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay.

Monroe makes clear that the protections afforded by 38 USC §§ 4301-4307 do not grant servicemen new rights or powers in relation to their work peers, or protect them from the administrative amendment of special rights granted to servicemen under State law, but merely protect them from discharge, denial of promotional opportunities, or other *comparable* adverse treatment motivated solely by reserve status, or "solely by reason of their military obligations". 452 US at 562. Applied to the case at bar, where no adverse treatment comparable to discharge or denial of promotional opportunities is at issue, *Monroe*

conclusively establishes the correctness of the Second Circuit's conclusion that the Directive did not violate the Act.[3] Indeed, the United States Department of Labor, charged with the enforcement of the Veterans' Act (38 USC § 4305), concluded in an advisory opinion that the rescheduling of pass days to coincide with military obligation in order to minimize payment of military leave did not violate the Act. *See, Gilman v Iowa State Penitentiary*, Case No. 62-7019 (1981).[4]

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[3]The fact that reservists may receive paid leave under New York Military Law § 242 does not alter this conclusion. Inasmuch as 38 USC § 4301 addresses only rights afforded to *all* employees, it neither addresses nor protects any special benefits made available to reservists and Guardsmen under state law. While Directive 2212 may in some cases limit the opportunity of a reservist or guardsman's ability to collect paid military leave under section 242, that limitation simply does not pertain to section 4301.

[4]This opinion instructively measures the competing interests of the parties in the matter at bar (emphasis added):

> Scheduling has always been a management prerogative, and it is assumed that scheduling is an essential element in operating efficiency. The allocation of resources in any endeavor must be efficient if success is to be realized. *A reservist is in no way penalized by being scheduled to be off on those days coincidental with his military duty.*
>
> * * *
>
> In the present case the issue is simply scheduling off days. Except in those instances where the scheduling is done exclusively by seniority, it should not be construed as an incident of employment, but rather a management prerogative. This even becomes more valid when juxtaposed against the veteran's real gripe that he needs the rest afforded by off days. It takes little imagination to compare the veteran here with those individuals who work a normal work week and still have the same military obligation to fulfill on weekends. Consequently, to construe the Act to permit individuals to get extra days off for rest in weeks they have reserve duty would be an absurd result.

We note further that the Directive imposed merely a temporary alteration of a small part of employees' pass day schedules. Significantly, employees bid on these schedules, according to seniority, in a single package which included a host of characteristics—location of post, nature of work, timing of shifts, and pass day schedule. The bulk of these characteristics were unaffected by the Directive. The Directive did not change the nature or location of the employees' work. Nor did it reduce their compensation received for that work; employees continued to earn forty hours pay for forty hours work. It did not limit seniority or pension rights; under the Directive, all Department employees, including military reservists and Guardsmen, continued to be able to bid on job packages in accordance with seniority. It did not reduce the opportunity to earn overtime. The single change required by the Directive was a shift in pass days on those few occasions during each year when Department employees had military training on weekends when they were scheduled to work. On those occasions, and on those occasions only, their pass days were rescheduled to coincide with military duty, in order to avoid abuse and to permit employees to perform military duty without altering their employment obligations vis-a-vis other, non-reservist employees. In this, the Directive merely treated all employees as if they were obligated to work forty hours each week for forty hours pay. Likewise, it treated all employees pursuing military training as if they had Saturdays and Sundays off.

No court has held that the Veterans' Act bars so minor a change as that imposed under the Directive—especially when it has been undertaken to reduce documented abuse of the military training system and places reservists at parity

with, rather than behind, non-reservist employees.[5] In each case where an employer's practice has been found to violate the Act, the incident or advantage of employment at issue was substantially more significant than that addressed here. Loss of employment is a clear example of such an advantage. *Peel v Florida Department of Transportation*, 600 F2d 1070 (5th Cir 1979). So too are workplace assignment and duties assigned. *Carlson v New Hampshire Department of Safety*, 609 F2d 1024 (1st Cir 1979), *cert denied*, 446 US 913 (1980) (employer may not permanently reassign an employee to a new post with different duties and work schedule on account of employee's reserve obligation). Another such incident is the salary assured by a forty-hour workweek guaranteed under a collective bargaining agreement. *West v Safeway Stores, Inc.*, 609 F2d 147 (5th Cir 1980) (employer required to schedule employee to work hours around the employee's military training obligation). But nowhere among these cases, or among any of the many cases cited by petitioners in their petition, is there a suggestion that a rescheduling of days off when necessary to permit employees to perform military service without interfering with their normal job duties constitutes improper action under section 4301(b)(3).

In light of the foregoing, petitioners' arguments supporting their petition are meritless. Contrary to their suggestion (Petition, pp 9-10, 15-16), the court below did not misconceive this Court's holdings in *Monroe* and *Accardi v Penn-*

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[5]We note that the reduction of fraud under the Directive yields clear benefit to the military institutions served by Department employees.

sylvania Railroad Co., 383 US 225 (1966). Nor did the court's holding "add[] a substantiality test" (Petition, p 10); instead, it merely affirms this Court's holding in *Monroe* that not every asserted "benefit" of employment is entitled to protection under the Act. Petitioners' claim that there is current theoretical confusion over what constitutes an incident or advantage of employment under the Act (Petition, p 12) is not relevant to the instant matter, where petitioners have failed to proffer any legal authority recognizing a claim under the Act comparable to the claim asserted here.

Nor are petitioners correct in their claim (Petition, pp 13-14) that the case conflicts with the Third Circuit's holding in *Waltermyer v Aluminum Company of America*, 804 F2d 821 (3d Cir 1986). In *Waltermyer*, the court held that an employee could not be penalized vacation pay received by other employees merely because he was absent from work during the holiday period due to military reservist commitments. 804 F2d at 825. In the instant matter, the Directive denied reservists neither salary, monetary benefits, pension rights, nor other rights or benefits available to a non-reservist.

Finally, petitioners simply have no foundation for their claim that this decision may have "an important and deleterious effect on the functioning of the Reserve and National Guard service" (Petition, p 18). Contrary to petitioners' suggestion (Petition, p 18), the Veterans' Act was not designed to protect reservists from the use of days off for

military training purposes.[6] Indeed, the majority of reservists who work on weekdays routinely spend days off at military training as part of their Reserve commitment—for which they are compensated and for which they receive the appreciation of a grateful nation. The Department's implementation of the Directive was not designed to treat reservists differently from other, non-reservist employees, but rather to adjust their employment obligations to correspond to those of their reservist peers who have weekends off, as well as those of non-reservist employees. The court below rightly found that this practice is unassailable under the Veterans' Act.

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[6]As the court correctly noted in *Pignato v American Trans Air, Inc.*, 14 F3d 342, 350 (7th Cir), *cert denied*, ____ US ____, 114 S Ct 2675, 129 L Ed 2d 810 (1994) (Guard member not entitled to special work scheduling preference to assure that military duty is performed during working hours, rather than during employee's personal time):

> At bottom, what [the employee] wanted was for any and all inconveniences of his Guard service to fall on [the employer], and none on himself. But this is not what the law, as set forth in *Monroe*, requires. [The employee] has no right to any such special treatment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
August 26, 1994

Respectfully submitted,

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No. 94-191

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IN THE

Supreme Court of the United States

October Term, 1994

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, Individually and as Representatives of a Class of Persons Similarly Situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, Individually and as Representatives of a Class of Persons Similarly Situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

I. Recent Discussions in the United States House of Representatives on a Pending Amendment to the Veterans' Act indicates *Rumsey* was wrongly reversed by the Second Circuit.

Pursuant to Rule 15.7 of the Supreme Court Rules, petitioners call to the attention of the Court recent language in the U.S. House of Representatives regarding new legislation enacted after submission on the petition herein. Less than two weeks ago, on September 13, 1994, the House passed H.R. 995, a House-Senate conference committee bill, entitled "Uniformed Services Employment and Reemployment Rights Act of 1994," which amends the Veterans' Reemployment Rights Act ("VRRA") to prohibit the denial of "any benefit" of employment; the statutory definition of "benefit" includes "the opportunity to select work hours." H.R. 995, 103rd Cong. 2d Sess., 140 Cong. Rec. H9117, §§4303(2), 4311(a) (1994).

As explained on the House floor by the Honorable G.V. Montgomery, Chairman of the House Veterans' Affairs Committee, immediately before passage of the bill, the new language represents a *clarification,* not amendment, of existing law:

> *I want to express the committee's strong disagreement with the recent decision in Rumsey v. N.Y. State Dept. of Corr. Services,* 19 F.3d 83 (2nd Cir. 1994), which limited the protection given reservists on active duty for training only to "substantial rights" such as discharge, demotion, or failure to promote. While the amended act speaks in terms of "benefit, benefits of employment or rights and benefits," and

> no longer uses the term "incident or advantage of employment," *the intent has always been to have an expansive interpretation,* such as that expressed by the sixth circuit in *Monroe v. Standard Oil Co.,* 613 F.2d 641, 645 (6th Cir. 1980), aff'd. 452 U.S. 549 (1981). "[I]ncidents or advantages of employment . . . is intentionally framed in general terms to encompass the potential [*sic*] limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns." [emphasis supplied]

140 Cong. Rec. H9133 (daily ed. September 13, 1994) (statement of Rep. G.V. Montgomery).

In its Committee Report a year earlier, accompanying the bill, the Veterans' Affairs Committee expressly approved the decision of the Trial Court in this case below as standing for the proposition that "an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work." H.R. Rep. No. 65, 103rd Cong., 1st Sess. pt. 1 at 33-34 (1993).

II. Employer allegations of past military leave "fraud" or "abuse" by some employees do not constitute a defense to a discrimination claim under the Veterans' Act.

Respondents repeatedly suggest throughout their opposition brief that they were justified in treating employee-reservists differently from non-reservist co-workers be-

cause some employee-reservists may have abused military leave in the past. (See Brief for Respondents in Opposition, August 26, 1994, pp. 3 ["mitigation of abuse"], 8 ["in order to avoid abuse", "undertaken to reduce documented abuse"], 9 n. 5 ["reduction of fraud"]).

This suggestion is a thinly veiled attempt to divert the Court's attention from the legal issue at bar and to prejudice petitioners. Respondents cite no decisional or statutory law to support this as a valid defense to a Veterans' Act claim. No evidence has been provided in this record to prove a case of fraud against any individual petitioner. If certain individuals had committed fraud, as respondents claim, the employer had ample recourse available to it against the alleged wrongdoers.

With respect to this particular case, respondents' "abuse argument" is plainly irrelevant. Kevin Breen, Director of Labor Relations for the New York State Department of Correctional Services, admitted under questioning by the Court itself that the alleged past abuse, while prompting more strict *verification* requirements with respect to military drill attendance, had nothing to do with institution of Directive 2212's *rescheduling* provision at issue in this case:

> The Court: Now, those [verification] requirements in and of themselves could have served the purpose of eliminating abuse, could they not?
>
> The Witness: Yes, sir.

Joint Appendix on Appeal to the Second Circuit, p. 297.

Thus, the District Court specifically found that the purpose of pass day rescheduling was to increase manpower and thereby reduce overtime, not to address alleged abuse. (Petition for Writ of Certiorari, No. 94-191, Appendix "E" p. 56a).

Petitioners respectfully submit that this Court reject respondents' suggestion that an employer be allowed to discriminate against all employee-reservists by merely alleging that some may have engaged in prior wrongdoing.

III. Based upon *Gilman*, the United States Department of Labor would conclude that the Second Circuit erred in failing to find a violation under 4301(b)(3) of the Veterans' Act.

Respondents imply, at page 7 n. 4 of their Brief in Opposition, by citing selected language from an advisory opinion entitled *Gilman v. Iowa Penitentiary,* Case No. 62-7019 (1981), that the Second Circuit's holding denying a violation of the Veterans' Act comports with the United States Department of Labor's policy on this matter.

For the Court's convenience, petitioners have annexed to this brief as Appendix "A" (*infra* at p. 1a-5a), a complete copy of that internal memorandum, including the paragraph between those paragraphs cited by respondents at footnote 4. In that paragraph, omitted by respondents, the Solicitor distinguishes the *Gunnar M. Stevens* case from *Gilman,* relying on the fact that in *Stevens*, "as a perquisite of seniority, employees bid on the specific days they desired to

have off. . ." while the claimant in *Gilman* apparently had no such seniority right. This distinction is found by the Solicitor to be determinative (Appendix "A", *infra*, p. 3a).

In this case, all Courts have found and respondents admit in the second sentence on page 8 of their opposing brief: "Significantly, employees bid on these [pass day] schedules according to seniority. . . ." As in *Gilman*, then, where "having certain days off is a right accruing by seniority" to all employees that right warrants protection under the statute. *Gilman*, p. 3a, *infra*, citing *Alabama Power v. Davis*, 431 U.S. 581 (1977); *Lott v. Goodyear Aerospace Corp.*, 395 F.Supp. 866 (N.D. Ohio, 1975).

CONCLUSION

A Writ of Certiorari should be granted to review the Second Circuit's holding that Section 4301(b)(3) of the Veterans' Act was not violated.

Dated: September 20, 1994
Albany, New York

Respectfully submitted,

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APPENDIX A—*Gilman v. Iowa State Penitentiary*, U.S.D.O.L., Veterans' Reemployment Rights Case No. 62-7019 (1981)

May 4, 1981
KCL:KFTL:DRB

TO:
Tedrick A. Housh, Jr.
Regional Solicitor

SUBJECT:
Iowa State Military Leave Policy
Thomas E. Gilman v. Iowa State Penitentiary
Reemployment Rights Case No. 62-7019(36)
SOL No. 06617-OP

This is in response to a request for an opinion from LMSA.

Issue

Does the Iowa State Military Leave Policy which, as interpreted by the state attorney general's office, permits public employers to schedule a reservist's days off so as to coincide with his military training, violate the provisions of Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. 2021 *et seq.*), hereinafter referred to as the Act?

Facts

Thomas E. Gilman was employed as a guard at the Iowa State Penitentiary in Fort Madison. Mr. Gilman, normally, received Sundays and Mondays off. It is the policy of the prison officials as directed by the Iowa State Department of Social Services to require employees who attend military drills to change their scheduled off days to coincide with their military obligations. In accordance with this policy, Gilman's regular off days were changed for the week of his drill to Saturday and Sunday. He refused to work the following Monday, December 1, 1980, and was terminated.

Recently the Iowa Legislature enacted into law several revisions to the Iowa Military Code. In interpreting these new sections the state attorney general sanctioned the idea of an employer "scheduling around" an employee's military obligations. This interpretation created the dilemma faced by the veteran.

Analysis

38 U.S.C. 2021(b)(3) states:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The obvious question posed is whether Iowa's attorney general's opinion, *supra,* conflicts in any way with this

federally bestowed right, thus making it invalid. It is necessary to further define "other incident or advantage of employment" to see if "scheduling around" is within the purview of this section. Fortunately the legislative history pertaining to this section provides the necessary guidance as to its meaning and intention. Essentially it means that reservists are entitled to the same treatment afforded coworkers not having military obligations. See U.S. Code Cong. & Admin. News p. 3421 (1968). Scheduling has always been a management prerogative, and it is assumed that scheduling is an essential element in operating efficiency. The allocation of resources in any endeavor must be efficient if success is to be realized. A reservist is in no way penalized by being scheduled to be off on those days coincidental with his military duty. The Iowa attorney general makes the point that in the event a loss of pay were to occur any reservist, such as Mr. Gilman, would be entitled to pay up to thirty (30) days a year.

This request makes reference by analogy to *Gunnar M. Stevens v. City of Oceanside* a case referred to Justice by the San Francisco Regional Solicitor's Office. An analysis quickly shows the stark legal differences between these situations. In *Gunnar M. Stevens,* the veteran was employed as a police officer by the city of Oceanside. It appears that as a perquisite of seniority, employees bid on the specific days they desired to have off with the most senior people naturally having the better selections. This was the only method of scheduling used by the city of Oceanside. Immediately then this casts the issue in a different light, namely that having certain off days is a right accruing by virtue of seniority. *See* e.g. *Alabama Power v. Davis,* 431 U.S. 581, 97 S.Ct. 2002 (1977). *Lott v. Goodyear Aerospace Corp.,* 395 F.Supp. 866 (N.D. Ohio 1975) was cited as authority to

support that veteran's claim. In *Lott* the veteran was charged for overtime.[1] He was scheduled to work on those weekends he had military drills. The court found this discriminatory towards the veteran since he had no other choice but to refuse it while other employees had two choices of working or refusing to work overtime. Again the issue is a perquisite of seniority. Overtime was assigned on that basis, thus bringing it clearly within the scope of the statute.

In the present case the issue is simply scheduling off days. Except in those instances where the scheduling is done exclusively by seniority, it should not be construed as an incident of employment, but rather a management prerogative. This even becomes more valid when juxtaposed against the veteran's real gripe that he needs the rest afforded by off days. It takes little imagination to compare the veteran here with those individuals who work a normal workweek and still have the same military obligation to fulfill on weekends. Consequently, to construe the Act to permit individuals to get extra days for rest in weeks they have reserve duty would be an absurd result.

This issue must be distinguished from those situations which would require a veteran to work a shift from 11:00 P.M. to 7:00 A.M. and report to military duty at 8:00 A.M. the same day. The same would be true if the veteran is required to report to work at 7:00 A.M. if he returns from drill at 2:00 or 3:00 A.M. the same day. The Congressional intent of reasonable accommodation to a veteran will certainly be violated in these situations since they would require the veteran to report to work or to reserve duty with little or no rest on the same day.

---

[1]This is the process of equalization. Its purpose is to provide the opportunity to work overtime when available and the intent is to schedule the employees with the least overtime first.

We are mindful provisions of the Act should always be liberally construed to effectuate the intentions of Congress in ensuring that veterans and reservists are protected. This, however, must be tempered with reason and common sense. The Iowa attorney general's opinion, when taken in context, does not violate rights of the reservist under the federal statute.

s/Keithley F. T. Lake
KEITHLEY F. T. LAKE
Attorney

Attachment: File